

1991

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Recommended Citation

Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 Fordham L. Rev. 257 (1991).

Available at: <https://ir.lawnet.fordham.edu/flr/vol60/iss2/2>

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SANCTIONS, SYMMETRY, AND SAFE HARBORS: LIMITING MISAPPLICATION OF RULE 11 BY HARMONIZING IT WITH PRE-VERDICT DISMISSAL DEVICES

JEFFREY W. STEMPEL*

INTRODUCTION

WITH only a small risk of overstatement, one could say that sanctions in civil litigation exploded during the 1980s, with the 1983 amendment to Federal Rule of Civil Procedure 11 acting as the principal catalyst. From 1938 until the 1983 amendment, only two dozen or so cases on Rule 11 were reported, with courts rarely imposing sanctions.¹ Although a few cases were notable by virtue of sanction size, prestige of the firm sanctioned, or publicity attending the underlying case,² the legal profession largely regarded Rule 11 as a dead letter.³ In addition, other sanctions provisions, such as Federal Rule of Civil Procedure 37 (regarding discovery) and Federal Rule of Civil Procedure 56(g) (regarding summary judgment affidavits made in bad faith), were seldom used or of great consequence.⁴ The statute authorizing imposition of counsel fees

* Professor of Law, Brooklyn Law School. Special thanks to Stephen Burbank, George Cochran, Greg Joseph, Alan Morrison, Morton Stavis, Georgene Vairo, the Brooklyn Law School faculty, the Committee on Federal Courts of the Association of the Bar of the City of New York, and the American Bar Association Litigation Section Committee on Rule 11 for ideas, information, and comments on this issue. Thanks also to Matthew Lepore and Ana-Maria Galeano for research assistance. This project was supported by a Brooklyn Law School summer research stipend.

1. See G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures § 2.02[b], at 31-40 (1990); S. Kassir, An Empirical Study Of Rule 11 Sanctions 2 (Fed. Jud. Ctr. 1985). The precise extent of old Rule 11's limited reach is difficult to state with precision. See, e.g., 28 U.S.C.A. Fed. R. Civ. P. 11 (West 1991) (counting annotations shows 20 reported Rule 11 decisions, four imposing sanctions); Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1, 34-37 (1976) (attributing disuse of Rule to its structure and language, 19 reported Rule 11 cases between 1938 and 1976, three imposing sanctions).

2. See, e.g., *Nemeroff v. Abelson*, 704 F.2d 652, 660-61 (2d Cir. 1983) (affirming district court award of more than \$50,000 against prestigious Boston law firm of Hale & Dorr for continuing defamation suit without colorable claims against Barron's magazine and its publisher, Alan Abelson, for statements made in Abelson's well-known "Walk Down Wall Street" column).

3. See, e.g., Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 182-83 (1985) [hereinafter Schwarzer, *Sanctions*] (new Rule 11 seeks to correct toothlessness of old Rule 11); Risinger, *supra* note 1, at 34-37 (old Rule 11 ineffective as deterrent to frivolous litigation).

4. But see *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (dismissal of complaint as sanction for repeated failure to comply with discovery orders). Although *National Hockey League* briefly brought Rule 37 sanctions

upon lawyers who unreasonably protract court proceedings, 28 U.S.C. § 1927,⁵ was employed even less often.⁶

As almost every attorney knows, things changed radically with the 1983 amendment to Rule 11. "New" Rule 11 resulted in approximately 700 reported Rule 11 opinions in just four and a half years, a tremendous increase from the previous 43 years.⁷ Suddenly, sanctions were the rage. Section 1927 sanctions also saw an upsurge, often inappropriately, as courts equated Section 1927, which requires intentional bad faith, with new Rule 11, which does not.⁸ Ironically, however, Federal Rules of

greater attention, *see* Epstein, Corcoran, Krieger & Carr, *An Up-Date on Rule 37 Sanctions After National Hockey League v. Metropolitan Hockey Clubs, Inc.*, 84 F.R.D. 145, 150-69 (1980), one survey found that "[a] decided majority of the [trial] judges reported that they 'seldom' or 'almost never' award the costs of bringing or opposing a discovery-related motion." R. Ellington, *A Study of Sanctions for Discovery Abuse* 8 (1979); *see also* Section of Litigation, American Bar Association, *Sanctions: Rule 11 and Other Powers* (2d ed. 1988) (noting that Rule 37 seldom used despite upsurge in Rule 11 sanctions after 1983).

Rule 56(g) was used even less often. *See, e.g.*, 28 U.S.C.A. Fed. R. Civ. P. 56(g) (West 1991) (15 reported cases giving provision serious discussion; five cases imposing sanctions for affidavits made in bad faith); *Southern Concrete Co. v. United States Steel Corp.*, 394 F. Supp. 362, 380-81 (N.D. Ga. 1975) (Rule 56(g) expenses denied although court suggests challenged affidavit fell below standards of acceptability), *aff'd*, 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

5. 28 U.S.C. § 1927 (1988) reads: "Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Some of the disuse of § 1927 is understandable. Until 1980, the statute spoke only of "costs" and was interpreted to permit recovery only of costs within the meaning of 28 U.S.C. § 1920, which the prevailing party could obtain as a matter of course under the latter statute. *See* *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759-60 (1980).

6. *See* 28 U.S.C.A. § 1927 (West 1991) (listing 19 cases applying sanctions against counsel under § 1927 from its inception through 1982); C. Wright, A. Miller & M. Kane, *Federal Practice and Civil Procedure* § 2670 (2d ed. 1983) [hereinafter Wright & Miller].

7. *See* G. Vairo, *supra* note 1, § 2.02[b], at 31-33 (1990). The study counted reported decisions in the period between August 1, 1983 and December 15, 1987. A computer data base search yields a figure of approximately 3,000 Rule 11 cases. Search of LEXIS, Genfed Library, US File (Oct. 11, 1991). *See also* T. Willging & E. Wiggins, *Rule 11: Survey of Federal District Court Judges; Study of Rule 11 Cases in Five Federal District Courts; Review of Published District and Appellate Court Opinions Pt. 1B*, at 2 (1991) (more than 800 published Rule 11 cases in district court during 1984-1989 period), *Pt. 1D*, at 1 (approximately 350 published court of appeals opinions deciding Rule 11 issues during 1984-1989 period).

8. *See, e.g.*, *Hackman v. Valley Fair*, 932 F.2d 239, 242 (3d Cir. 1991) (Section 1927 requires finding of subjective bad faith by attorney as prerequisite to sanction); *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968) (assessment of costs on attorney guilty of misconduct only in instances of "serious and studied disregard for the orderly process of Justice"), *cert. denied*, 395 U.S. 908 (1969). Despite this clearly established law, trial courts confuse the objective standard of Rule 11 and the subjective standard of § 1927 with disturbing frequency. *See, e.g.*, *Williams v. Giant Eagle Mkts., Inc.*, 883 F.2d 1184, 1190-93 (3d Cir. 1989) (district court reversed for improperly applying § 1927 to losing party rather than counsel and for improperly finding bad faith due to counsel pressing claim in face of strong defenses); *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986) (district court orders reversed for imposing § 1927 sanctions under objective standard rather than actual bad faith standard).

Civil Procedure 26(g) and 16(f), which Congress also strengthened in 1983,⁹ saw relatively little use.¹⁰

Because Rule 11 empowered courts to sanction any "paper" it found to violate the Rule and because the complaint was the paper most frequently sanctioned,¹¹ critics of new Rule 11 argued that it was manifestly pro-defendant in impact,¹² disproportionately burdened some types of claims more than others,¹³ discouraged innovative lawyering,¹⁴ or had all of these undesirable effects.¹⁵ Defenders of new Rule 11, on the other hand, extolled the Rule or responded to the criticisms.¹⁶ Controversy over Rule 11 remained heated enough to prompt the Advisory Committee on the Civil Rules to issue a Call for Comments in July 1990. By November 1990, more than 100 bar associations, judges, scholars, practitioners, and other interested parties had responded.¹⁷ In essence, judges expressed support for Rule 11 while practitioners leveled strong criti-

9. See G. Vairo, *supra* note 1, § 1.01, at 4-5.

10. See Federal Courts Comm. of the Ass'n of the Bar of the City of New York, *Comments on Federal Rule of Civil Procedure 11 and Related Rules*, 46 The Rec. 267, 268-69 (1991) [hereinafter *New York Bar Report*] (only 85 LEXIS opinions citing Rule 26(g) and 153 opinions invoking Rule 16(f) during same period that saw more than 3,000 Rule 11 opinions).

11. See S. Burbank, *Rule 11 In Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* at 110 (1989) [hereinafter *Third Circuit Task Force*]; T. Willging, *The Rule 11 Sanctioning Process* 11 (1988); S. Kassir, *An Empirical Study Of Rule 11 Sanctions* 28-29 (1985); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988).

12. See *New York Bar Report*, *supra* note 10, at 269 ("Rule 11 . . . has become a distinctly defendants' tool"); *id.* at 270-71 (citing *Third Circuit Task Force*, *supra* note 11, and T. Willging, *supra* note 11).

13. See Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270, 302-4 (1989) [hereinafter Tobias, *Public Law*]; Tobias, *Rule 11 and Civil Rights Litigation*, 37 Buffalo L. Rev. 485, 502-05 (1989) [hereinafter Tobias, *Civil Rights*]; see also Vairo, *supra* note 11, at 200-01 (noting tendency of Rule 11 to be applied against civil rights plaintiffs and to discourage civil rights claims).

14. See, e.g., Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 Vill. L. Rev. 575, 598-99 (1987) (absence of subjective good faith as defense to sanctions motions makes lawyers less willing to try innovative arguments or to bring cases where resolution of contested facts not preordained); Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1338-39 (1986) (same).

15. See, e.g., Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 Hastings L.J. 383, 386-405 (1990) [hereinafter Nelken, *Chancellor*] (Rule 11 hypertrophy by much of bench and bar has produced more problems of disparate impact and sideshow litigation than solutions to the problem of frivolous claims); Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925, 1932-33 (1989) (same).

16. See, e.g., Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1024-25 (1988) [hereinafter Schwarzer, *Revisited*] (admitting problems and suggesting shift in judicial analysis of Rule 11 motions but favoring retention of Rule 11 in current form); Schwarzer, *Sanctions*, *supra* note 3, at 204-05 (generally praising Rule 11); see also Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 503-06 (1990) (Advisory Committee Reporter describes Rule 11 in neutral terms implying positive impact).

17. See Submissions to Advisory Comm. on the Civil Rules in Response to Call for Comments on Rule 11 (copies on file with author).

cism. In February 1991, the Advisory Committee held a day of hearings on Rule 11 and in May 1991 it issued a proposed revised Rule 11.¹⁸

One can understatedly describe the situation as in ferment and likely to remain so as the Rule is revised, tested, criticized, perhaps revised anew, and so on. Intelligent commentators have focused on Rule 11 and the problem of deterring and punishing frivolous litigation while trying to avoid chilling zealous advocacy and restricting access to the courts. Several authors have worked especially hard to put the Rule in context or to suggest general guidelines for application of the Rule.¹⁹ However, the sanctions debate is a distributional political battle that has some unavoidable aspects of a zero-sum game. If Rule 11 is written or interpreted stringently, some claims are sacrificed in the name of efficiency, deterring the unfounded or abusive, and thinning court dockets. If Rule 11's text or application is made more forgiving, some of these values are sacrificed in favor of zealous advocacy, innovative lawyering, and claimants'

18. As of this writing, a draft of new Rule 11 has been approved by the full Standing Committee on The Federal Rules. A period for public comment runs until February 1, 1992, with a public hearing scheduled for November 21, 1991 in Los Angeles. The Standing Committee will review the comments and determine either to make further revisions in the proposal, drop plans to change Rule 11, or submit the revised draft of Rule 11 to the Supreme Court. If the Court agrees with the Committee, it reports the new Rule to Congress, which has 180 days to act. If Congress takes no action, the Rule is enacted. See 28 U.S.C. §§ 2072-74 (1988). Although the Advisory Committee and Standing Committee's determinations historically set the tone of Rules revision under the Rules Enabling Act, the many steps in the process make apt the adage attributed to baseball great Yogi Berra: "It ain't over 'til its over."

19. In addition to the works of Judge Schwarzer and Professors Nelken and Vairo cited above, some particularly comprehensive efforts are the *New York Bar Report*, *supra* note 10; ABA Section of Litigation, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101 (1988) [hereinafter *ABA Standards*]; Note, *A Genuine Ground in Summary Judgment for Rule 11*, 99 Yale L.J. 411 (1989) [hereinafter *Genuine Ground*]; Note, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale L.J. 901 (1988); Note, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions*, 100 Harv. L. Rev. 630 (1987) [hereinafter *Plausible Pleadings*].

Except for Judge Schwarzer, who favors Rule 11 as written, see Schwarzer, *Revisited*, *supra* note 16, at 1018, these authors all fit within what I define as the liberal/moderate group of Rule 11 critics who nonetheless would not abolish the rule. Others are more critical of the Rule. See, e.g., Cochran, *Rule 11: The Road to Amendment*, 7 Fifth Cir. Rptr. 559, 560, 574 (1991) (notwithstanding title, author makes clear that he would prefer repeal of Rule 11); ABA Section of Litigation, Comments Submitted to the Advisory Committee in Response to Call for Comments 3 (Oct. 29, 1990) (37% of members proposing repeal) (copies on file with author); J. Frank, Comments Submitted to the Advisory Committee in response to Call for Comments 1 (Oct. 30, 1990) (copies on file with author) (proposing repeal); Solovy, *The Cost of Rule 11*, *Compleat Law* (Spring 1990), at 26, 30 (same). At the November 1990 N.Y.U. Law School Conference on Rule 11, Prof. Burbank succinctly stated the argument for repeal: "The good judges don't need it and the bad judges misuse it."

Another group of perhaps greater size and importance has argued for retaining Rule 11 in current textual form. See Schwarzer, *Revisited*, *supra* note 16, at 1018; M. Rosenberg, Testimony before the Advisory Committee, in New Orleans (Feb. 21, 1991); A. Miller, Comments at N.Y.U. Law School Conference on Rule 11 in New York City (Nov. 3, 1990).

rights.²⁰ Because some lawyers tend to favor the access/advocacy/innovation goals while others prefer the efficiency/expense/deterrence goals, no theory of Rule 11 can hope to satisfy all sides of the sanctions debate completely.

Nonetheless, Rule 11 practice, which even its supporters admit has been plagued by inconsistency, can be made more even-handed, both on its own terms and in relation to the Federal Rules of Civil Procedure as a whole. This article proposes one structural approach to Rule 11 that has largely been overlooked by commentators and courts.²¹ Simply put, it proposes that courts expressly recognize a strong presumption that any claim that has survived the pre-verdict stages of litigation be immune from Rule 11 sanctions. This presumption can be overcome only by judicial findings, supported by the record, that the claimant has engaged in fraud, misrepresentation, or other egregious misconduct. If properly applied, this approach can lead to appropriate judicial restraint in Rule 11 practice as well as increased equity between plaintiffs and defendants. In particular, the approach reduces the potential adverse impact of Rule 11 in civil rights claims.

The suggested approach would create a presumptive safe harbor for claimants, but not one that is so impregnable as to encourage or condone abusive conduct by lawyers or litigants. The claimant would be permitted to prosecute the action vigorously. Knowing that reflexive denials will limit the court's ability to impose sanctions should encourage courts to scrutinize pretrial motions under Rule 12(b)(6) and Rule 56 closely, and should lessen the temptation to automatically deny directed verdict

20. See Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C.L. Rev. 1023, 1053-56 (1989) (acknowledging trade off but arguing that status quo unwisely privileges access to courts over efficiency concerns). Because of judicial focus on the complaint, Rule 11 has naturally affected plaintiffs most. However, defendants, third-party defendants, and intervenors can be adversely affected by Rule 11 to the extent that they are claimants.

21. Despite the myriad of Rule 11 commentary, no author has suggested this article's approach of a presumptive safe harbor. *Genuine Ground*, *supra* note 19, comes closest by suggesting the integration of the Rule 56 summary judgment test with the Rule 11 "well grounded in fact" and "warranted by existing law" tests in order to prompt judges to appreciate the potentially different inferences available when viewing a Rule 11 motion. However, the author does not develop standards for determining when Rule 11 does apply, although her general view accords with that of this article. The author writes, "[s]anctions, in addition to dismissal, should be imposed for unreasonable or dishonest presentation of meritless claims" rather than unsuccessful claims. *Genuine Ground*, *supra* note 19, at 414.

Courts, except for having correctly concluded that a claim is not sanctionable merely because it is dismissed, have given even less thought to the relation of Rule 11 and dismissal devices. See, e.g., *Healey v. Chelsea Resources, Ltd.*, 133 F.R.D. 449, 453 (S.D.N.Y. 1990) ("denial of summary judgment in no way establishes that this suit had any basis in fact. On the summary judgment motion, the court had before it only those facts and allegations that the parties chose to present in their affidavits"). In the vast majority of Rule 11 decisions involving cases that survived summary judgment, the courts make no mention of any possible relationship.

motions. Although this approach may result in more dismissals in close cases, dismissals can be appealed and are less likely to undermine counsel's practice or pocketbook seriously. The presumptive safe harbor would thereby reduce Rule 11's chilling effect found by so many. Although this approach, like other attempts to bridge the gap separating Rule 11's fans and foes, will not bring universal satisfaction, it would soften highly problematic aspects of the rule.

Part I of this article first briefly discusses the 1983 change to current Rule 11 and the effect of Rule 11 in practice. Part I then outlines the major pre-verdict disposition devices of Rule 12(b)(6), summary judgment, and directed verdict. I contend that claimants are doubly disadvantaged from the civil practice developments of the 1980s if courts do not employ the presumptive safe harbor suggested by this article. Part II outlines in greater detail the rationale, application, and impact of my suggested approach and explains the particular advantages of this approach for civil rights cases and fee shifting under both 42 U.S.C. § 1988²² and Title VII.²³

I. CIVIL PROCEDURE REFORM IN THE 1980S: A DECADE OF COUNTER-REVOLUTION

A. *The Establishment Strikes Back*

New Rule 11 did not overtake civil practice overnight. Rather, it was part of a general trend to limit the ease with which litigants could bring and sustain claims.²⁴ Beginning in the 1970s, the profession was increas-

22. See 42 U.S.C. § 1988 (1988). This section provides for the award of reasonable attorney's fees to the prevailing party in claims brought under applicable civil rights statutes.

23. See 42 U.S.C. § 2000e-5(k) (1988). This section provides for the award of reasonable attorney's fees at the discretion of the court to the prevailing party in an equal employment opportunity action.

24. See Louis, *supra* note 20, at 1033-37; Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 439-44 (1986) [hereinafter Marcus]. The contraction of the class action device during the 1970s was perhaps the start of the counter-revolution. See, e.g., *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-70 (1978) (eliminating "death knell" doctrine permitting interlocutory review of denials of class certification where this was effective end of litigation); *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177-79 (1974) (requiring class representatives to bear cost of notifying class in Rule 23(b)(3) class actions seeking damages); *Zahn v. International Paper Co.*, 414 U.S. 291, 292-300 (1973) (multiple plaintiffs with separate and distinct claims must each satisfy the minimum jurisdictional amount to sue in federal court); *Snyder v. Harris*, 394 U.S. 332, 335-40 (1969) (limiting utility for plaintiffs and frequency of use of class action device where jurisdiction founded on diversity by limiting aggregation of class member claims to satisfy jurisdictional amount); see also Tobias, *Public Law*, *supra* note 13, at 287-96 (in response to the litigation explosion, courts, the Advisory Committee, and Congress have attempted to discourage the filing of suits, to expedite the resolution of suits and to punish abuses by attorneys). The contraction of the class action device was criticized by Professor Miller, who later was principal drafter of Rule 11 and largely an advocate of the 1980s reforms raising procedural barriers for claimants. See Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 Harv. L. Rev. 664, 678-79 (1979).

ingly influenced by a growing perception that the 1938 Federal Rules of Civil Procedure and subsequent interpretation had made it too easy to state a claim that would survive a motion to dismiss.²⁵ Professor Arthur Miller, former Reporter for the Advisory Committee and the primary drafter of new Rule 11, joined this chorus by characterizing the Rule 12(b)(6) motion to dismiss for failure to state a legal claim as "last effectively used during the McKinley Administration."²⁶ Judicial reluctance to grant summary judgment, or at least the perceived judicial hesitancy occasioned by unfortunate rhetoric,²⁷ increased the perception that weak claims were not being intercepted by pretrial motion. Directed verdict motions also had limited utility since many judges, having allowed the case to progress to trial, were inclined to obtain a jury verdict for reasons of judicial administration unrelated to the merits.²⁸ A corollary to this view held that the ease of pleading and sustaining a claim allowed litigation to be used for blackmailing defendants into settlement.²⁹ In addi-

25. See, e.g., Louis, *supra* note 20, at 1029-33 (judicial system too tolerant of weak or frivolous claims, allowing too many poor claims to survive to trial and maintain settlement value); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn. L. Rev. 1, 17-19 (1984) (costs of civil litigation, even for weak or frivolous claims, choke system's ability to adjudicate meritorious claims). These authors particularly criticized decisions giving broad construction to Fed. R. Civ. P. 8(a) regarding what was necessary to state a claim and the consequent reduction in the utility of Rule 12 motions as effective tools for obtaining pretrial dismissal. See, e.g., Conley v. Gibson, 355 U.S. 41, 45-48 (1957) (complaint may not be dismissed for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that plaintiff can prove no set of facts . . . entitl[ing] him to relief"); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (opinion by Judge Charles Clark, principal drafter of the Federal Rules, reverses district court dismissal of fragmented complaint failing to allege all elements of claim for conversion and becomes influential), cited in Conley, 355 U.S. at 46 n.5.

26. A. Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility 7-8 (1984); accord Miller, *Litigation in America Today*, 61 Wis. B. Bull. 9, 11 (Apr. 1988) (liberality of federal civil rules has made dismissal difficult).

27. See, e.g., Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (reversing trial court grant of summary judgment, writing that summary judgment must be denied when "there is the slightest doubt as to the facts" (quoting earlier opinion in Doehler Metal Furniture v. United States, 149 F.2d 130, 135 (2d Cir. 1945))). The ringing echo of the "slightest doubt" test served both as a lightening rod for critics, see Wright & Miller, *supra* note 6, § 2727, at 176-77, and as a superficial indication of absurd judicial reluctance to employ the summary judgment mechanism as intended by the drafters of the Federal Rules. A more searching look at actual outcomes in lesser known cases, however, showed that courts frequently granted summary judgment, even in the supposedly obstructionist Second Circuit. See Brachtel, *Has Summary Judgment Been Eliminated in the Second Circuit?*, 46 Brooklyn L. Rev. 565, 566 (1980).

28. See D. Herr, R. Haydock & J. Stempel, Motion Practice § 21.2.3, at 606 (2d ed. 1991) [hereinafter Herr] (judge has little incentive to grant directed verdict as this necessitates retrial of case if reversed).

29. See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (availability of discovery increases settlement value to claimant by "in terrorem" effect); New Eng. Data Servs., Inc. v. Becher, 829 F.2d 286, 288 (1st Cir. 1987) (expressing fear that without rigorous pleading burden "a plaintiff with a largely groundless claim will bring a suit and conduct extensive discovery in the hopes of obtaining an increased settlement rather than in the hopes that the process will reveal relevant evidence"); Konstan-

tion, the increase in court filings led to talk of a "litigation explosion."³⁰

By the 1980s, conservative reform sentiments had gathered sufficient strength to cause rule changes,³¹ statutory changes,³² and changes in judicial application of the existing Federal Rules.³³ One commentator has referred to these developments as a "counter-revolution" against the notice pleading/open discovery revolution embodied in the 1938 rules.³⁴ In addition, the Advisory Committee proposed a more far-reaching revision of Federal Rule of Civil Procedure 68 to have this offer-of-judgment cost-shifting rule include counsel fees. However, Congress, in response to

tinakos v. FDIC, 719 F. Supp 35, 38 (D. Mass 1989) (stressing importance of strict enforcement of Fed. R. Civ. P. 9(b) that requires fraud to be plead with particularity in securities law claims because they have a high "strike suit value").

30. See, e.g., Tobias, *Public Law*, *supra* note 13, at 287-96 (discussing role of rules in litigation explosion; Louis, *supra* note 20, at 1029 ("The procedural woes of our civil justice system are easy enough to list. The federal courts are currently bursting with cases, claims, and defenses, many of which are apparently not well founded.")) (footnotes omitted; no empirical support for assertion regarding volume of unmeritorious claims); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4, 61-69 (1983) (observing trend claiming excessive litigation but disputing accuracy of the perception); Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231, 233 (1976) (former solicitor general and federal judge argues that courts are increasingly used for "self-defeating effort to guarantee every minor right people think they ought ideally to possess").

31. See Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 997-1001 (1980); see also *id.* at 1000 (1980) (Powell, Stewart, and Rehnquist, J.J., dissenting from reporting of amended rules to Congress) (arguing that discovery revisions do not go far enough to streamline litigation); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. Rev. 579, 579-83 (mentioning Supreme Court's promulgation of amendments to the federal discovery rules in 1980).

32. 28 U.S.C. § 1927 was amended in 1980 to permit a party victimized by an attorney's bad faith misconduct to recover both counsel fees and expenses resulting from the misconduct.

33. Compare *Denny v. Carey*, 72 F.R.D. 574, 578 (E.D. Pa. 1976) (rejecting defense argument that Fed. R. Civ. P. 9(b) requirement of pleading fraud with particularity imposes rigorous burden upon plaintiff and explaining that Rule 9(b) requires only that defendant be able to "prepare an adequate answer" and "flesh out the allegations in the complaint through discovery") with *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 878 (1st Cir. 1991) (to satisfy Rule 9(b), plaintiff must "specify the time, place and content of an alleged false representation . . . [and] provide some factual support for the allegations of fraud"). See also Marcus, *supra* note 24, at 445-50 (tracing trend away from liberal notice pleading approach of *Conley v. Gibson* and toward increasingly rigorous burden of pleading facts, and noting this trend even where Rule 9(b) not applicable as "antidote to pro-plaintiff biases" seen in 1938 Rules). But see Louis, *supra* note 20, at 1037-38 (antitrust and civil rights claims "are inherently vague and seem to generate an abundance of complex, protracted, and ultimately unsuccessful litigation").

34. See Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brooklyn L. Rev. 35, 35 (1988) [hereinafter Risinger, *Counter-Revolution*] (noting "emerging consensus that federal civil procedure is in the midst of a counterrevolution" but noting debate over nature and impact of revision movement); accord Tobias, *Public Law*, *supra* note 13, at 287-96; Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 Brooklyn L. Rev. 1, 3, 23-30 (1988); Burbank, *The Chancellor's Boot*, 54 Brooklyn L. Rev. 31, 33-34 (1988).

widespread criticism of the Proposed New Rule 68, principally from legal scholars and public interest/civil rights lawyers, thwarted the attempt.³⁵ The Zeitgeist of the counter-revolution gust so strongly that one ordinarily insightful commentator stridently criticized these groups for taking their case to Congress in the face of the Advisory Committee's rejection of their well-taken concerns.³⁶ In this reascendency of the haves,³⁷ where advocates of the disempowered were criticized for merely participating in the process, the 1983 Rule 11 amendment was perhaps the most important development.

B. *The 1983 Rule 11 Amendment*

Prior to 1983, Rule 11 stated that the signature of an attorney was required on judicial papers and that the signature constituted counsel's certification that the paper was not brought in bad faith, to multiply proceedings, or to harass the opponent.³⁸ New Rule 11 retained the signature requirement and its status as a certification but dramatically changed the substance of the provision.

New Rule 11 states that counsel's signature certifies that he has made reasonable inquiry into the circumstances underlying the action and that the paper is:

well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,

35. See Burbank, *supra* note 34, at 34. See generally Burbank, *Proposal to Amend Rule 68—Time to Abandon Ship*, 19 U. Mich. J.L. Ref. 425 (1986) (providing background about criticisms and proposed amendments to the rule). The Rule 68 amendments were viewed by many as a threat to the bringing of civil rights claims because the amendments could result in a de facto "English Rule," where the losing party reimbursed the counsel fees of the prevailing party (in contrast to the "American Rule" in which each litigant bears its own counsel fees and expenses) whenever the prevailing defendant had the presence of mind to make an offer of judgment.

Notwithstanding congressional rejection, the Supreme Court achieved some of the goals of the thwarted amended rule in *Marek v. Chesney*, 473 U.S. 1 (1985) (finding counsel fees a "cost" within the meaning of Rule 68 because of substantive law, 42 U.S.C. § 1988, which authorizes fee shifting to prevailing plaintiffs); See *id.* at 7-12; see also *Christiansburg Garment v. E.E.O.C.*, 434 U.S. 412, 420-21 (1978) (prevailing civil rights defendant may only recover counsel fees where plaintiff's claim is unfounded or frivolous); *Crossman v. Marcoccio*, 806 F.2d 329, 334 (1st Cir. 1986) (*Marek v. Chesney* does not change *Christiansburg Garment*; the losing civil rights or Title VII plaintiff need not pay defense fees despite Rule 68 offer unless plaintiff's claim is frivolous), *cert. denied*, 481 U.S. 1029 (1987).

36. See Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C.L. Rev. 795, 848-51 (1991).

37. See Risinger, *Counter-Revolution*, *supra* note 34, at 35. Some commentators "view it [the counter-revolution] as a cynical movement to restore to defendants, particularly powerful, establishment 'repeat player' defendants, traditional procedural advantages they lost by virtue of the Federal Rules' emphasis on full disclosure and decision on the merits," with Professor Risinger "tending toward this view". *Id.* at 35 & n.4. According to Professor Risinger, "[w]hatever the conscious motivation, it seems clear that many of the burdens flowing from recent changes in the system have fallen more heavily upon plaintiffs than defendants." *Id.* at 35 (footnote omitted).

38. See Fed. R. Civ. P. 11 (1938).

and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.³⁹

New Rule 11 imposes an objective standard upon lawyers and clients. Their assessment of the factual and legal merit of the court paper must be justified by reference to the mythical average reasonable person⁴⁰ (or reasonable lawyer, if that is not an oxymoron). No longer could a lawyer who erred argue that she intended no harm.⁴¹ "Simply put, subjective good faith no longer provides the safe harbor it once did."⁴² Put more cynically, the "pure heart/empty head" defense to Rule 11 sanctions is no longer available.⁴³ In addition, where the court finds a Rule 11 violation, the court is required to impose a sanction, although it has discretion as to the type of sanction and the amount of a monetary sanction.⁴⁴

Although counsel are not required to delineate with great specificity whether they argue that a claim is warranted by existing law or by a law reform argument, and although attorneys may not be sanctioned for an arguable ethical violation that does not constitute the bringing of a frivolous complaint,⁴⁵ most courts have found sanctions available where a particular claim or group of claims is unsupported by fact or law even if the paper as a whole has merit.⁴⁶ Although courts remain divided over

39. Fed. R. Civ. P. 11 (1983 & 1987). The 1987 changes to Rule 11 were of a technical and nonsubstantive nature.

40. See *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987).

41. Old Rule 11 authorized sanctions only for "willful" violations. See *Biggs v. Public Serv. Coordinated Transp.*, 280 F.2d 311, 313 (3d Cir. 1960).

42. *Eastway Constr. Corp.*, 762 F.2d 243 at 253.

43. See Schwarzer, *Sanctions*, *supra* note 3, at 186-87.

44. *Eastway Constr. Corp.*, 762 F.2d at 254 n.7. However, judicial discretion is not unbounded. See, e.g., *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 584 (E.D.N.Y. 1986) (on remand, district court awards \$1,000 in counsel fees to defendant as sanction for plaintiff's Rule 11 violation in bringing claim unwarranted by law); *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 122 (2d Cir. 1987) (finding \$1,000 award to be so low as to constitute abuse of discretion, imposing \$10,000 in counsel fees as sanction, viewing this as lowest permissible range of district court discretion). But see *Eastway Constr. Corp.*, 821 F.2d at 126 (Pratt, J., dissenting) (suggesting \$10,000 inappropriately low sanction and suggesting that sanctions analysis begin with lodestar—attorney hours multiplied by reasonable hourly billing rate—of defense counsel, which totaled more than \$50,000).

45. See *Golden Eagle Distrib. v. Burroughs Corp.*, 801 F.2d 1531, 1539-41 (9th Cir. 1986).

46. See, e.g., *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir. 1990) (*en banc*) (overruling *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202, 1205 (9th Cir. 1988)); *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 415 (7th Cir. 1988) (Rule 11 imposed against attorney who represented authors in copyright action that con-

certain Rule 11 issues,⁴⁷ many of the initial uncertainties or divisions have been replaced by a consensus of application.⁴⁸ In addition, courts appear to have moved toward limiting Rule 11 to the "least severe sanction" necessary to effectuate the purposes of the rule, with appellate courts in many instances reversing or remanding very large sanctions awards.⁴⁹ Some commentators have also observed improved judicial sensitivity to the application of Rule 11 against civil rights claimants.⁵⁰ Nonetheless, counsel and litigants, particularly civil rights claimants, continue to find in Rule 11 a chilling impact on their claims.⁵¹

C. Sanctions Law as a Source of Asymmetry Between Claimants and Defendants

Despite steps toward consensus over Rule 11's application, controversy remains, both because of remaining inconsistency⁵² and because a substantial segment of the profession finds current Rule 11 unpalatable even if properly applied. In particular, Rule 11 has been disproportionately directed at complaints rather than other papers such as summary judgment motions, discovery motions, motions to transfer or other papers routinely filed by defendants.⁵³ Inevitably, this practice affects plaintiffs more adversely than defendants. In addition, other Federal

tained frivolous claims). *But see* *Burull v. First Nat'l Bank*, 831 F.2d 788, 789-90 (8th Cir. 1987) (where complaint is legally and factually substantial enough to reach a jury and the inclusion of meritless claims has no appreciable effect on the litigation, Rule 11 sanctions are not required), *cert. denied*, 485 U.S. 961 (1988).

47. Compare *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1436 (7th Cir. 1987) (even a paper adequately supported by fact and law sanctionable if court finds paper filed for improper purpose) with *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) (factually grounded, legally cognizable claim insulated from improper purpose sanctions).

48. See *Herr*, *supra* note 28, § 19.4.4, at 523-35; *ABA Standards*, *supra* note 19, at 124.

49. See, e.g., *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) (en banc) (adopting "the principle that the sanction imposed should be the least severe sanction adequate to the purpose of Rule 11"); *Cheek v. Doe*, 828 F.2d 395, 397-98 (7th Cir. 1987) (court reserves the right to impose whatever sanction it deems necessary to effectuate the purposes of rule 11); *Cabell v. Petty*, 810 F.2d 463, 467 (4th Cir. 1987) (violation of Rule 11 does not automatically entitle plaintiff to attorney's fees, the district court retains right to award least severe sanction appropriate).

50. See, e.g., Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 Vill. L. Rev. 105, 110-16 (1991) [hereinafter Tobias, *Rule 11 Recalibrated*] ("panels in more than half of the federal circuits enforced [Rule 11] in ways that were solicitous of the needs of civil rights plaintiffs").

51. See *New York Bar Report*, *supra* note 10, at 270-71.

52. See *Genuine Ground*, *supra* note 19, at 418-25 (describing judicial inconsistency of Rule 11 results and rationales and "enduring confusion surrounding Rule 11").

53. See T. Willging & E. Wiggins, *supra* note 7, Pt. 1B, at 13. In the five judicial districts studied, the complaint was the subject of the Rule 11 sanctions in more than half the cases where sanctions were imposed. In reported cases, the complaint was the object of the sanction in more than 58 percent of cases. The next most frequent object of sanctions was the ubiquitous "Other" category at 15 percent. See *id.* Pt. 3, at 6; see also *New York Bar Report*, *supra* note 10, at 269-71 (summarizing other studies with similar data).

Rules such as 16(f), 26(g), 37, and 56(g), which could perhaps place equivalent or greater burdens on defendants, remain virtual dead letters.⁵⁴ There also remains the disturbing although incomplete statistical picture that suggests that civil rights and discrimination claims are more frequently subjected to Rule 11 sanctions.⁵⁵ In addition, claims have progressed to trial or jury verdict only to be sanctioned, sometimes with at least partial appellate affirmance.⁵⁶ This last problem, although eclipsed by the higher decibel debate over Rule 11 generally, is significant,⁵⁷ illustrative of judicial error, and unnecessary in view of the law of pre-trial case disposition.

D. Pre-Verdict Disposition

1. Rule 12(b)(6)

Although comments about the limited utility of Rule 12(b)(6) contain a substantial element of truth, the motion to dismiss for failure to state a claim continues to hold significance in civil litigation. With the filing of a complaint, Federal Rule of Civil Procedure 12 provides defense counsel with several options, including motions to dismiss for lack of subject matter jurisdiction,⁵⁸ for absence of personal jurisdiction,⁵⁹ for improper

54. This disparity lead the Association of the Bar of the City of New York to recommend an omnibus sanctions rule for abusive conduct in the hope that this would focus judges upon all forms of frivolous litigation, not only the making of weak or unsubstantiated claims. See *New York Bar Report*, *supra* note 10, at 299-302.

55. See T. Willging & E. Wiggins, *supra* note 7, Pt. 1C, at 2-3; G. Vairo, *supra* note 1, § 2.02[b], at 35-37; *Third Circuit Task Force*, *supra* note 11, at 68-72; *New York Bar Report*, *supra* note 10, at 270; Tobias, *Civil Rights*, *supra* note 13, at 490-92. But see T. Willging & E. Wiggins, *supra* note 7, Pt. 2 (summaries of cases where sanctions imposed in five district courts suggest that many of the sanctioned civil rights claims were frivolous and involved inadequate preparation concerning procedure and other legal questions rather than substantive interpretation of civil rights statutes).

56. See, e.g., *Harris v. Marsh*, 679 F. Supp. 1204, 1222, 1392-93 (E.D.N.C. 1987) (plaintiffs and counsel assessed more than \$80,000 in sanctions after seven years of litigation and multi-week trial), *aff'd in part sub nom. Blue v. United States Dep't of the Army*, 914 F.2d 525, 551 (4th Cir. 1990) (sanctions substantially reduced in amount), *cert. denied*, 111 S. Ct. 1580 (1991); *Steinberg v. St. Regis/Sheraton Hotel*, 583 F. Supp. 421, 425-26 (S.D.N.Y. 1984) (plaintiffs and counsel assessed \$30,000 in sanctions after unsuccessful trial of age and ethnic discrimination claims).

57. Although there initially appear to be relatively few reported cases revealing imposition of Rule 11 sanctions after denial of summary judgment or other pre-verdict disposition motions, the problem is not rare. See T. Willging, *supra* note 11, at 77. In a random sample of 60 cases, sanctions were imposed after trial or settlement in more than one-third of the cases. See *id.* Where such sanctioning occurs based on a deferred decision regarding earlier conduct offending Rule 11, this may not run counter to this article's proposed approach. In addition, where the case survived until trial due to a claimant's misconduct, this article's approach authorizes sanctions. Nonetheless, the one-third figure of this sample suggests that failure to harmonize Rule 11 practice with pre-verdict disposition practice presents a significant problem despite its having been overshadowed by the larger debate over Rule 11.

58. See Fed. R. Civ. P. 12(b)(1).

59. See Fed. R. Civ. P. 12(b)(2).

venue,⁶⁰ for defective process,⁶¹ for inadequate service of the complaint⁶² and, most important, for failure to state a claim (Federal Rule 12(b)(6)).

Although this article focuses on the relation between Rule 12(b)(6) and Rule 11, the same considerations will often apply in cases where defendant has made a motion to dismiss because of alleged jurisdiction or venue defects. In all of these situations, the possibility exists that the court may deny the defense motion and later come to believe that the complaint or some aspect of it was not supported by subject matter jurisdiction, that the court had no personal jurisdiction over the defendant, that venue was improper, or that the claim was not one entitled to legal relief. Where the court's change of heart is so great that it views the claim as unsupported in fact or unwarranted by law within the meaning of Rule 11, the potential arises for the imposition of Rule 11 sanctions well after the court's first opportunity to have disposed of the case.

I argue in Part II(A), below,⁶³ that trial courts should generally resist such "eleventh hour" sanctions unless the claimant avoided Rule 12 dismissal through fraud, misrepresentation, or similarly egregious misconduct. Rule 12(b)(6) cases are generally more likely to present this situation than the jurisdiction/venue motions of Rule 12(b)(1)-(3). The latter group of motions may, and often does, involve submission of facts by affidavit or otherwise, with lengthier, more focused oral arguments or hearings.⁶⁴ Unless the judge is misled by the claimant, she is likely to decide the jurisdiction or venue motion correctly and consistently. By contrast, hornbook law states—indeed requires—that the Rule 12(b)(6) motion accept as true all of the factual allegations of the complaint for purposes of ruling on the motion.⁶⁵ Courts have traditionally departed from this principle in only the most outlandish cases.⁶⁶ The Rule 12(b)(6) motion thus tests only the legal strength of plaintiff's claims,

60. See Fed. R. Civ. P. 12(b)(3).

61. See Fed. R. Civ. 12(b)(4). "This motion attacks the adequacy of the content of the summons." Herr, *supra* note 28, § 9.2.1, at 191. Because plaintiffs are given a preprinted summons by the Clerk of the Court upon the filing of the complaint, the content of the summons can be defective only from typographical errors and the motion is rare. It is nearly as rare in state court, where attorneys have the basic summons language on word processor files or preprinted forms.

62. See Fed. R. Civ. P. 12(b)(5). This motion attacks the adequacy of the delivery of the summons and complaint rather than the content of the summons. See Herr, *supra* note 28, § 9.2.1, at 191.

63. See *infra* notes 115-44 and accompanying text.

64. See Herr, *supra* note 28, §§ 10.1, 10.2, 11.3; Wright & Miller, *supra* note 6, §§ 1350, 1351, 1352.

65. See Herr, *supra* note 28, §§ 9.5.1, 9.5.2; Wright & Miller, *supra* note 6, §§ 1357, 1363. However, the court is not, of course, required to accept the legal conclusions alleged by a claimant.

66. See F. James & G. Hazard, Civil Procedure § 5.19 (3d ed. 1985); James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va. L. Rev. 218, 218-27 (1961). Court deference to pleading may be changing in practice without benefit of judicial acknowledgment. See Marcus, *supra* note 24, at 436.

assuming a "best case scenario" of the facts of the dispute.⁶⁷ As a result, courts "have historically disfavored the Rule 12(b)(6) motion" and have refused to grant it where "there is room for doubt."⁶⁸ Although it is not waived if defendant fails to raise the issue in the first response to the complaint, the Rule 12(b)(6) motion is ordinarily made early in the litigation.⁶⁹

Even though a claim has survived a 12(b)(6) motion, the confluence of these factors makes it possible that a court will come to view the claim as insufficiently grounded in fact and that the claimant's attorney failed to conduct a reasonable inquiry within the meaning of Rule 11. However, notwithstanding its comparative rarity, the Rule 12(b)(6) motion has considerable utility where the defense makes a legal attack on the pleadings,⁷⁰ and correlates quite well with the "warranted by law" and law reform⁷¹ prongs of the Rule 11 certification. Presumably, a court will more likely grant the "pure law" Rule 12(b)(6) motion and will less frequently change its view in such cases than in cases where the plaintiff's alleged facts differ markedly from defendant's version of events. In short, the Rule 12(b)(6) motion, despite its bad press in recent years,⁷² may be both eminently grantable and quite relevant to a subsequent Rule 11 inquiry. Where a court has denied a Rule 12(b)(6) motion based on its legal analysis rather than on fictional fact pleading by the defendant, the claim must presumably be one either warranted by existing law or supported by a colorable law reform argument.

2. Rule 56: Summary Judgment

Modern summary judgment doctrine possesses much of what the Rule

67. See Herr, *supra* note 28, § 9.6.2.

68. *Id.* § 9.6.1, at 220. In practice, the plaintiff has usually received "the benefit of most legal doubts as well" as factual inferences. *Id.* § 9.6.2, at 221; accord Wright & Miller, *supra* note 6, § 1357, at 321-37. The factors and judicial treatment surrounding Rule 12(b)(6) are essentially duplicated with Rule 12(c) motions for judgment on the pleadings. See *id.* § 1367; Herr, *supra* note 28, § 9.6.3.

69. See Herr, *supra* note 28, § 9.6.1; Wright & Miller, *supra* note 6, § 1357, at 300-01.

70. See Herr, *supra* note 28, § 9.6.2, at 222.

71. By "law reform" prong, I mean the portion of Rule 11 that exempts from sanction a paper's contents that make a good faith argument for the extension, modification, or reversal of existing law. Because the Rule 12(b)(6) motion attacks the legal (rather than factual) soundness of a pleading, denial of the motion should trigger the "safe harbor" presumption outlined in Part II of this article if there should occur an application for Rule 11 sanctions based on either the "warranted by law" or "law reform" prongs of Rule 11. Because the pleading was not dismissed, it can not be legally frivolous absent subjective bad faith of the pleader in making a law reform argument. Denial of a Rule 12(b)(6) motion, however, should have no similar presumptive effect upon a later Rule 11 motion alleging that the pleading was not well grounded in fact or was interposed for an improper purpose, because these are fact-based arguments that are not adjudicated during the process of the legal analysis that attends a 12(b)(6) motion.

72. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (Court suggests failure of Rule 12(b)(6) to meet expectations as device for eliminating claims unworthy of trial); *supra* note 26 and accompanying text (suggesting dismissal under Rule 12(b)(6) is almost impossible).

12(b)(6) motion lacks in ability to resolve fact-based disputes prior to trial. In 1986, the Supreme Court issued three major decisions designed to strengthen the motion and to increase summary judgment. In *Celotex Corp. v. Catrett*,⁷³ the Court clarified a number of seemingly technical but substantively important points regarding the burden of production facing both movants and non-movants. *Celotex* stated that summary judgment movants need not invariably accompany the motion with affidavits: outlining a claimant's failure to produce evidence by reference to the record of the case could in many cases be sufficient, so long as the defendant was doing something more than making "a conclusory assertion that the plaintiff has no evidence to prove his case."⁷⁴ In response to a properly made summary judgment motion, a claimant must do more than merely allege favorable facts or express a vague hope that discovery will produce evidence in its favor. Rather, the non-movant must either bring forth admissible evidence or conduct discovery it believes will lead to information making summary judgment inappropriate, and the court must give claimants adequate time and opportunity for that discovery.⁷⁵

The tone of the *Celotex* opinion was as important as its holding. Writing for the majority, Chief Justice Rehnquist praised summary judgment in a manner that could not have been lost on trial courts, stating:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' Before the shift to 'notice pleading' accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of 'notice pleading,' the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.⁷⁶

73. 477 U.S. 317 (1986).

74. *Celotex*, 477 U.S. at 328 (White, J., concurring). Justice White's concurrence was the key vote in *Celotex*, a 5-4 decision regarding the merits of the specific defense summary judgment motion and plaintiff's response.

75. *See id.* at 326.

76. *Id.* at 327 (citation omitted). Parenthetically, I must note my disagreement with Chief Justice Rehnquist's implicit suggestion that notice pleading is the villain that emasculated Rule 12. It is not the generality of pleading under Rule 8(a) that makes it difficult to grant a motion to dismiss. Judicial reluctance to grant Rule 12(b)(6) motions stems from the historical common law requirement, applied to Rule 12, that the court must accept the claimant's allegations as true and refrain from scrutinizing evidence. Even the most rigorous code pleading requirements would not prevent a lawyer who was willing to

Earlier the same year, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,⁷⁷ the Court held that summary judgment could be granted in a complex antitrust case even where the non-movant had presented expert witness affidavits in support of its inferences drawn from circumstantial evidence of a predatory pricing conspiracy. Despite the expert testimony, the Court reversed the Third Circuit's denial of summary judgment because the Court found plaintiff's theory of the case "implausible" according to existing neoclassical economic theory, particularly the Chicago School of antitrust analysis.⁷⁸ Under such circumstances, the Court suggested that only direct evidence of the alleged predatory pricing conspiracy would suffice to defeat summary judgment.⁷⁹

Because *Matsushita* was heavily influenced by the new substantive law of predatory pricing and economic theory,⁸⁰ it remains unclear how much the *Matsushita* approach has affected summary judgment in other classes of cases,⁸¹ or even in antitrust cases not involving predatory pricing.⁸² For example, the *Matsushita* approach has not been as aggres-

plead any fact from avoiding dismissal. Such requirements would, however, prevent many honest lawyers from pleading with specificity in cases where they can not obtain specific information without the benefit of discovery.

77. 475 U.S. 574 (1986).

78. See *Matsushita*, 475 U.S. at 591-93, 596-97.

79. See *id.* at 597-98.

80. See Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 111 (1988). "In the main, *Matsushita* seems more an opinion restricting the use of antitrust claims than an opinion on summary judgment. Summary judgment was merely the vehicle by which the Court rid the judicial system of an antitrust claim disfavored by five of the Court's members." *Id.*

81. See, e.g., *Major Computer, Inc. v. Academy Life Ins. Co.*, 929 F.2d 1249, 1252 (8th Cir. 1991) (reversing summary judgment in claim of tortious interference with contract); *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 905-07 (2d Cir. 1991) (summary judgment reversed in product liability claim); *Koch v. Hankins*, 928 F.2d 1471, 1478-81 (9th Cir. 1991) (summary judgment reversed in securities fraud case); *Association of Am. Medical Colleges v. Cuomo*, 928 F.2d 519, 525-26 (2d Cir. 1991) (summary judgment reversed in copyright case focusing on claim of federal copyright law pre-emption of state law requiring disclosure by testing company); *Scripps Clinic & Research Found. v. Genentech, Inc.*, 927 F.2d 1565, 1570-71 (Fed. Cir. 1991) (summary judgment reversed in patent case); *Williams v. Wright*, 927 F.2d 1540, 1550-51 (11th Cir. 1991) (summary judgment reversed in ERISA case).

In all of these cases, the courts found no rules of substantive law that limited the inferences that a jury might draw from facts in dispute. Consequently, facts subject to different interpretation at trial required denial of summary judgment. By contrast, the *Matsushita* court established a rule of antitrust law holding that allegations of long-term predatory pricing conspiracies are so "implausible" that plaintiff was required to submit more than mere circumstantial evidence in order to go to trial. See *Matsushita*, 475 U.S. at 595-98.

82. See, e.g., *Comcoa, Inc. v. NEC Tel.*, 931 F.2d 655, 665 (10th Cir. 1991) (reversing district court grant of summary judgment in antitrust case); *Tunis Bros. v. Ford Motor Co.*, 823 F.2d 49, 50-51 (3d Cir. 1987) (same), *cert. denied*, 484 U.S. 1060 (1988); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 260-61 (2d Cir. 1987) (same), *cert. denied*, 484 U.S. 977. But see *Bhan v. NME Hosp.*, 929 F.2d 1404, 1409 (9th Cir. 1991) ("*Matsushita* significantly clarified the standards for resolving summary judgment cases in the antitrust arena.").

sively employed in civil rights claims that assert improper concerted activity by defendants.⁸³ Because the substantive law of job discrimination recognizes the often indirect nature of the proofs,⁸⁴ *Matsushita* appears to have had less impact outside antitrust.⁸⁵

In *Anderson v. Liberty Lobby*,⁸⁶ the Court suggested greater generalized support for trial court grants of summary judgment, stating that a trial court may grant summary judgment even where the non-movant has submitted evidence in conflict with that of the movant's as long as the evidence is one-sided or only "colorable."⁸⁷ *Liberty Lobby* stated that in ruling on summary judgment motions, trial courts were to make the same inquiry undertaken in deciding directed verdict motions: "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence from which the jury could reasonably find for the plaintiff."⁸⁸

However, courts will not always find cognizable the inferences that discrimination plaintiffs urge on the basis of statistical disparity or other circumstantial evidence.⁸⁹ A claim violative of the fact prong of Rule 11 should never survive a defendant's summary judgment motion absent fraud or like circumstances.

E. *Developments in Pre-Verdict Disposition and Sanctions Law Combining in Favor of Defendants*

Where courts, absent applicability of the fraud exception, impose sanctions after trial, or even after summary judgment, the court's imposition

83. See *Kraemer v. Grant County*, 892 F.2d 686, 689-90 (7th Cir. 1990) (sustaining pretrial dismissal of claims under 42 U.S.C. §§ 1983 and 1985 but reversing Rule 11 sanctions, noting that conspiracies are by their nature very difficult to prove and dependent on facts largely within control of defendants, requiring resort to evidence based on circumstantial evidence).

84. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

85. See, e.g., *Rosen v. Thornburgh*, 928 F.2d 528, 533-34 (2d Cir. 1991) (circumstantial evidence held to create triable issue of anti-semitism in discharge of Drug Enforcement Agency trainee and whether purported reason for discharge was pretextual); *Ting v. United States*, 927 F.2d 1504, 1510 (9th Cir. 1991) (arrestee had amnesia but indirect medical evidence of manner of shooting held to create triable issue notwithstanding direct testimony of admittedly self-interested federal arresting agents).

However, courts will not always find cognizable the inferences discrimination plaintiffs urge on the basis of statistical disparity or other circumstantial evidence. See, e.g., *Larry v. White*, 929 F.2d 206, 210 (5th Cir. 1991) (disparity among schools in passing Texas dental examination insufficient proof of race discrimination to merit trial of fourteenth amendment claim).

86. 477 U.S. 242 (1986).

87. *Liberty Lobby*, 477 U.S. at 249-50.

88. *Id.* at 252.

89. See *Genuine Ground*, *supra* note 19, at 420-24; see, e.g., *Larry v. White*, 929 F.2d 206, 210, 212 (5th Cir. 1991) (disparity among schools in test passage rates of black and white graduates; claims surviving summary judgment must therefore also satisfy Rule 11).

of sanctions looks uncomfortably like ad hoc imposition of the English Rule of fee shifting and presents serious equitable concerns. Judges who deny dismissal but later impose sanctions play a judicial version of the discredited merchant's practice of "bait-and-switch": claimants are permitted, even encouraged, to pursue a claim, but then are required to pay defendant's subsequently accumulated, sizeable counsel fees should they lose badly enough to prompt the court to view the case as weak. The potential abuse is heightened in situations where the claimant or its counsel develops a strained relationship with the judge during the course of trial.

Judicial decisions have touched upon the relation of Rule 11 and dismissal devices but have given few definitive pronouncements.⁹⁰ For example, the Eleventh Circuit recognized the relation but stopped short of a general presumption against sanctions for claims surviving dismissal. In *Sullivan v. School Board of Pinellas County*,⁹¹ the court stated that

90. Cf. *Genuine Ground*, *supra* note 19, at 424 ("Many judges do not see a link between Rule 11 and summary judgment."). A few courts have at least touched on the relationship between pretrial dismissal and sanctions. For example, in *Sullivan v. School Bd. of Pinellas County*, 773 F.2d 1182 (11th Cir. 1985), the court noted that "cases where findings of 'frivolity' have been sustained typically have been decided in the defendant's favor on a motion for summary judgment or a Fed. R. Civ. P. 41(b) motion for involuntary dismissal" and that "[i]n cases where the plaintiffs introduced evidence sufficient to support their claims, findings of frivolity typically do not stand." *Sullivan*, 773 F.2d at 1189.

However, the *Sullivan* court declined to adopt an explicit presumption against sanctions for claims that survive until trial and instead made absence of pretrial dismissal a factor to consider in ruling on sanctions motion. The court lists as factors: "(1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits." *Id.* The *Sullivan* court reversed the trial judge's imposition of sanctions. *See id.* at 1189-90. Other courts have also found survival to trial a factor to consider but have stopped short of creating a presumption against sanctions. *See, e.g., E.E.O.C. v. Kimbrough Inv. Co.*, 703 F.2d 98, 103 (5th Cir. 1983) (sanctions denied due to existence of prima facie case and defendant's attempt to settle); *Jones v. Texas Tech Univ.*, 656 F.2d 1137, 1146 (5th Cir. 1981) (careful consideration given to case by district court and the full-blown trial on merits were factors militating against imposition of sanctions).

More commonly, courts either fail to mention any possible relation between pretrial dismissal and the strength of a claim, or in practice they find the absence of pretrial disposition no serious restraint on the award of sanctions. For example, in *Steinberg v. St. Regis/Sheraton Hotel*, 583 F. Supp. 421 (S.D.N.Y. 1984), the court found plaintiffs' suit "one of the most frivolous employment discrimination actions ever brought." *Id.* at 424. The court was confronted, however, with its own failure to grant defendant's summary judgment motion in a case that proceeded to trial. To this, the court responded:

The fact that [the case] survived a summary judgment motion merely indicates that at the time that motion was brought, though the case seemed very weak, there did appear to be genuine issues of fact sufficient, under the stringent standards of this circuit, to warrant denial of the motion. Indeed, the unfortunate irony of this case is that by giving the plaintiffs the benefit of the doubt as to the claims of proof that they made in their opposition to that motion, as the Court was required to do, we are now confronted with the defendant's very compelling application for attorney's fees.

Id. at 424. The *Steinberg* court awarded \$30,000 in sanctions to defendant. *See id.* at 426.

91. 773 F.2d 1182 (11th Cir. 1985).

"[d]eterminations regarding frivolity are to be made on a case-by-case basis," but observed that "[f]actors considered important in determining whether a claim is frivolous" include introduction of evidence by the claimant and "whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits."⁹² Other federal courts have expressed clear reluctance to award Rule 11 sanctions or Section 1988 fees where a claim has survived summary judgment.⁹³ However, none have made as strong a statement against Rule 11 sanctions after denial of summary judgment as did the Minnesota Supreme Court in *Uselman v. Uselman*.⁹⁴ *Uselman* involved a challenge to the administration of a family trust fund. The case spanned several years during which plaintiff's claims survived several summary judgment motions. After a defense verdict at trial, plaintiff's counsel was sanctioned under Minnesota Rule of Civil Procedure 11, which reads congruently with Federal Rule 11, in the amount of approximately \$130,000. The supreme court reversed, primarily on grounds of fairness, but also suggesting that a case could not logically reach trial and be so worthy of sanctions.⁹⁵

As previously noted, courts have widely held that a claim's dismissal does not prove a Rule 11 violation.⁹⁶ For example, in *Harrison v. Dean Witter Reynolds, Inc.*,⁹⁷ the court granted summary judgment against plaintiff on a number of securities claims because it found plaintiff's evidence "too thin to allow a jury to find in favor of plaintiffs on necessary factual issues."⁹⁸ However, the court properly denied Rule 11 sanctions

92. *Id.* at 1189.

93. See, e.g., *E.E.O.C. v. Kimbrough Inv. Co.*, 703 F.2d 98, 103 (5th Cir. 1983) (prevailing Title VII defendant denied counsel fees after bench trial of claim); *Jones v. Texas Tech Univ.*, 656 F.2d 1137, 1146 (5th Cir. 1981) ("the fact that a plaintiff's claim received careful consideration by the district court may properly be taken into account in determining whether the claim was frivolous"); accord *Greenberg v. Hilton Int'l Co.* 870 F.2d 926, 937 (2d Cir. 1989) (sanctions denied for pressing discrimination claims that survived summary judgment despite subsequent voluntary dismissal by plaintiff), *remanded and vacated on other grounds*, 875 F.2d 39 (2d Cir. 1989); see also *Nelken, Chancellor*, *supra* note 15, at 391 ("It is both inefficient and fundamentally unfair . . . to impose Rule 11 sanctions" where a party "has survived a summary judgment motion."); *Schwarzer, Revisited*, *supra* note 16, at 1019 (favorably citing *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) for taking this view and criticizing *Steinberg v. St. Regis/Sheraton Hotel*, 583 F. Supp. 421 (S.D.N.Y. 1984) for failing to appreciate relation between Rule 11 and summary judgment).

94. 464 N.W.2d 130, 144 (Minn. 1990) ("A party who survives these [summary judgment] motions with the major claims intact should not be subject to sanctions after trial predicated on these surviving claims."); see *infra* text accompanying note 117.

95. See *Uselman*, 464 N.W.2d at 144.

96. See *ABA Standards*, *supra* note 19, at 118-19; see, e.g., *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 937 (2d Cir. 1989) (sanctions denied where plaintiff's attorney failed to withdraw claim based on papers that had previously survived a summary judgment motion), *remanded and vacated on other grounds*, 875 F.2d 39 (2d Cir. 1989); *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986) (Rule 11 sanctions reversed against civil rights attorney who withdrew claims against police; court found discovery necessary to show absence of meritorious claim), *cert. denied*, 480 U.S. 918 (1987).

97. 132 F.R.D. 184 (N.D. Ill. 1990).

98. *Harrison*, 132 F.R.D. at 188. The court explained that "[p]laintiffs did not fail to

because it viewed the plaintiff's supporting evidence as merely weak rather than nonexistent.⁹⁹ The Advisory Committee on the Civil Rules appears to take this view as well. In the draft Committee Note accompanying a proposed revision of Rule 11, the Committee noted that if "summary judgment is rendered against a party [this] does not necessarily mean . . . that it had no evidentiary support for its position. On the other hand, if a party has sufficient evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have had sufficient 'evidentiary support' for purposes of Rule 11."¹⁰⁰

On the other side of the coin, however, even courts sensitive to the pitfalls of Rule 11 do not always seem to appreciate that a summary judgment denial limits the likelihood that a sanctioned claim lacks adequate grounding in fact.¹⁰¹

offer any evidence in support of the factual issues determined adversely to them, but failed to overcome the overwhelming weight of the evidence against their arguments." *Id.* (emphasis in original).

99. See *id.* at 187-88. The court also saw the ultimate merits of the case as considerably less germane to the Rule 11 inquiry than a focus upon "whether plaintiffs and their attorneys undertook a reasonable inquiry into the facts and applicable law before filing." *Id.* at 187.

Harrison provides another example of the greater leeway courts seem to accord sophisticated commercial defendants in litigation. According to the court, "Dean Witter seems to argue that, in light of the summary judgment ruling, it is obvious plaintiffs failed to meet the Rule 11 requirements of reasonable inquiry." *Id.* at 187. If the court's assessment is accurate and flows directly from Dean Witter's arguments, the brokerage house's position was a manifestly incorrect statement of the law. Although Dean Witter could safely argue that the law should be modified to slant in an even more pro-defendant direction, it apparently did not identify its argument as sounding in law reform.

Further, Dean Witter's argument, as characterized by the court, suggests a virtual per se requirement of Rule 11 liability for losers of pretrial dismissal motions, a position rejected by most courts and commentators, see *supra* note 89 and accompanying text, thus making it hard to cast defendant's Rule 11 argument as one offered in good faith and free of an improper purpose such as harassing the plaintiff. Under these circumstances, one could make a compelling case that it is the defendant rather than the plaintiffs who should be sanctioned. However, the court not only showed no such inclination but devoted considerable detail to rejecting Dean Witter's weak argument for Rule 11 sanctions.

100. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence 6 (August 1991) (copies on file with author). Draft Rule 11 would substitute the term "evidentiary support" for the words "well grounded in fact" under current Rule 11. The proposed amendments, if adopted, would make extensive changes in Rule 11 and other rules, principally those governing discovery. As of this writing, the proposal remains open for public comment and can not displace the current rules until at least late 1992 and, more realistically, until late 1993. More extensive commentary on proposed amended Rule 11 obviously is beyond the scope of this article.

101. See *Healey v. Chelsea Resources*, 133 F.R.D. 449, 453 (S.D.N.Y. 1990). In *Healey* the court wrote:

The court's denial of summary judgment in no way establishes that this suit had any basis in fact. On the summary judgment motion, the court had before it only those facts and allegations that the parties chose to present in their affidavits. The court's denial of the motion does not undercut the court's conclu-

Perhaps the most succinctly blunt misanalysis of the relation between summary judgment and Rule 11 is found in *Lemaster v. United States*.¹⁰² *Lemaster* involved plaintiffs, Mr. and Mrs. Lemaster and their 18-year-old son, Stephen. The IRS pursued the Lemasters for having fraudulently transferred assets, primarily the family trucking company, to Stephen in order to dodge income tax liability. After its investigations, the IRS concluded that the son and parents were alter egos and seized the family assets. Magically, Mr. Lemaster opened his wallet and paid the past due taxes to obtain release of the property.¹⁰³

Not willing to let poor enough alone, the Lemasters then sued the government pursuant to 26 U.S.C. § 7426, contending that the IRS had wrongfully seized property legitimately belonging to their son. Despite the thin veneer covering the Lemaster's misconduct, the trial court denied the government's motion to dismiss the son's claims, although it granted summary judgment as to the parents' claims. The trial court stated that a material issue of fact existed regarding whether the son was the owner of the property or merely the instrumentality of his father.¹⁰⁴ Not surprisingly, the district court, after a two-day bench trial, found the issue substantially clearer and entered judgment for the government, also awarding Rule 11 sanctions totalling nearly \$20,000 (approximately \$5,000 against counsel and \$15,000 jointly and severally against the Lemasters).¹⁰⁵

In affirming the sanctions award, the Sixth Circuit concluded "that there is no reasonable way the Lemasters or [counsel] could have doubted that James [the father] was the true owner of all contested assets."¹⁰⁶ Of course, if no reasonable fact finder could have failed to find a sham transaction and all relevant facts were before the court prior to trial, one tends to think that summary judgment should have been granted. Only judicial error, poor lawyering by defendants, misconduct by plaintiffs, or a matter hinging on credibility coupled perhaps with misconduct by plaintiffs can explain a denial of summary judgment if the

sion that facts in [the plaintiff's attorney's] possession, which first became apparent to the court at trial, made clear that the suit had no reasonable factual basis.

Id.

Judge Robert L. Carter, who has been outspoken in his concern that Rule 11 not chill vigorous advocacy, especially in civil rights claims, decided *Healey*. For a discussion of Judge Carter's view of Rule 11, see generally Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179 (1989). The first half of this quotation suggests rejection of this article's approach. However, the last sentence and the context of the case suggest that in *Healey*, Judge Carter implicitly concluded that counsel's conduct was sufficiently egregious to overcome this article's proposed presumption against sanctions where summary judgment is denied.

102. 891 F.2d 115 (6th Cir. 1989).

103. See *Lemaster*, 891 F.2d at 116-18 for more details of the Lemaster saga.

104. See *id.* at 117-18.

105. See *id.* at 118. The trial court concluded that the son's alleged ownership of the trucking business and other property was a "sham."

106. *Id.* at 119.

Sixth Circuit's characterization of the evidence is correct. The latter two events may justify sanctions. The former two explanations probably should not.

The Lemasters did argue that they were immune from sanctions due to the trial court's denial of summary judgment, an argument the appellate court rejected¹⁰⁷ citing cases that rejected the argument¹⁰⁸ and quoting noted Rule 11 authority, Gregory Joseph, Esq., who wrote:

The mere fact that a judge declines to dismiss an action or grant summary judgment on procedural grounds, or allows an issue to go to the jury for purposes of administrative convenience, does not preclude the imposition of sanctions or even constitute evidence that sanctions should not be granted.¹⁰⁹

Despite Mr. Joseph's deserved status as a Rule 11 authority, the quoted statement is overbroad and promotes a flawed and excessively harsh view of Rule 11's relation to pre-trial practice, especially as read by the *Lemaster* court. In addition, one must appreciate the ambiguity in the statement. A denial of summary judgment on "procedural grounds" can be read as meaning the denial of summary judgment on a technicality—for example to accommodate plaintiff's request for discovery or because an affidavit was not notarized, thus preventing the denial from being a serious examination of the merits of the case. Of course, where denial on procedural grounds occurs because of misconduct by the non-movant, sanctions may be apt.¹¹⁰ By contrast, denial of summary judgment on an acceptably developed record with no intervening factual revelations before or at trial could be viewed as denial of summary judgment on substantive rather than procedural grounds.

At a minimum, denial of summary judgment must be at least some evidence of a nonsanctionable paper unless the party resisting summary judgment has deceived the court or the party moving for summary judgment has made the motion so close to trial as to trigger the administrative convenience concerns mentioned in the Joseph excerpt. In addition, the *Lemaster* court wrenches the quote out of context from Section 11(F) of the Joseph treatise, which states as a black letter proposition that "[t]he fact that a judge has considered and accepted a legal argument is

107. See *Lemaster*, 891 F.2d at 121.

108. The cases cited were *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) and *Barrios v. Pelham Marine, Inc.*, 796 F.2d 128 (5th Cir. 1986). As discussed *infra* notes 146-48 and accompanying text, *Pavelic & LeFlore* and *Barrios*, like *Lemaster*, are perfectly consistent with this article's suggested approach when analyzed correctly because in all cases the sanctioned parties appear to have avoided summary judgment through misconduct rather than judicial error.

109. *Lemaster*, 891 F.2d at 121 (quoting G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 169 (1989)).

110. See, e.g., *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 937-39 (2d Cir. 1989) (Rule 11 sanctions imposed; attorney criticized for discovery abuse and lack of candor), *re-manded and vacated on other grounds*, 875 F.2d 39 (2d Cir. 1989).

evidence that the argument is non-frivolous.”¹¹¹ Joseph would go even further than this article suggests by giving substantial weight to dissenting and concurring opinions expressing minority views in support of a rejected “‘warranted by existing law’” or law reform argument under Rule 11.¹¹²

More to the point, Joseph states on the same page cited by *Lemaster* that “the fact that a case gets to trial is some measure of its merit.”¹¹³ Whether one criticizes Joseph for ambiguity or the *Lemaster* court for superficial analysis, the result is the same: neither persuasively demonstrates a lack of relationship between pre-verdict disposition devices and Rule 11.¹¹⁴ As the preceding discussion shows, the two are inevitably logically linked.

II. REDUCING ASYMMETRY AND SHARPENING JUDICIAL FOCUS THROUGH A PRESUMPTION AGAINST RULE 11 SANCTIONS

A. *The Logic of the Presumption*

I propose a common law codification of what the better-reasoned decisions do implicitly. The suggested rule, by elevating a claim's pretrial survival to a presumption against sanctions and a “semi-safe” harbor, goes somewhat beyond the ad hoc approach of *Sullivan v. School Board of Pinellas County*¹¹⁵ and other better-reasoned cases¹¹⁶ that treat the pretrial proceedings merely as a factor to consider in Rule 11 decisions. This more structured approach of the per se presumption builds upon the approach taken by the Minnesota Supreme Court in *Uselman v. Uselman*.¹¹⁷ It better serves the purposes of both the civil rights laws and judicial efficiency by more closely cabining district court discretion and by reducing the temptation for a trial court to punish lawyers or litigants

111. See G. Joseph, *supra* note 108, at 167.

112. *Id.* at 167-68.

113. *Id.* at 169-70 (citing *National Ass'n of Gov't Employees, Inc. v. National Fed'n of Fed. Employees*, 844 F.2d 216, 223 (5th Cir. 1988) and *Schwarzer, Revisited*, *supra* note 16, at 1019). Like the *Lemaster* court, attorney Joseph cited *Barrios v. Pelham Marine, Inc.*, 796 F.2d 128, 132 (5th Cir. 1986), but noted that sanctions were deemed apt in that case because the unsuccessful summary judgment motion came on the eve of trial.

114. Where other cases have stated that a claim's survival to trial provides no protection against sanctions, they have applied law other than Rule 11 and often dealt with claimant conduct that appears to satisfy this article's suggested “fraud, misrepresentation, or other egregious misconduct” exception to the proposed presumption against sanctions after denial of a pre-verdict dismissal motion. See, e.g., *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 937-40 (2d Cir. 1989) (awarding attorney fees under 42 U.S.C. § 2000e-5(k) due to counsel's discovery abuse and lack of candor with the trial court), *remanded and vacated on other grounds*, 875 F.2d 39 (2d Cir. 1989); *Zissu v. Bear, Stearns & Co.*, 805 F.2d 75, 80 (2d Cir. 1986) (awarding defense fees pursuant to 15 U.S.C. § 77k(e) against securities fraud claimant who appears to have kept litigation alive through bad faith prosecution).

115. 773 F.2d 1182 (11th Cir. 1985); see *supra* notes 91-93 and accompanying text.

116. See cases cited *supra* note 93.

117. 464 N.W.2d 130 (Minn. 1990); see also *supra* notes 94-95 and accompanying text (discussing case).

it comes to find irritating. It would also restore some of the symmetry that has been lost during the 1980s as various changes in the rules, the composition of the bench, and precedent have tilted the pre-existing balance of litigation force to the advantage of defendants.

Commentators and bar associations have also touched upon the issue without clearly establishing an approach to the interrelation of Rule 11 and pretrial dismissal. An exception is the recent report of the Association of the Bar of the City of New York,¹¹⁸ that suggested the approach taken in this article¹¹⁹ and stated that the presumption against sanctions should be rebutted only if the district court finds the party targeted by a sanctions motion to have avoided dismissal through "a knowing or reckless misrepresentation that was a proximate cause of the court's denial" of the dismissal motion.¹²⁰

This article's proposed presumption also holds some potential for improving judicial decisions and litigant behavior. Although I, along with others, have criticized the Supreme Court's 1986 summary judgment trilogy for imposing logistical burdens on claimants and for tempting too many judges to act as pretrial fact finders,¹²¹ the new Rule 56 jurisprudence is, even in my view, not an entirely bad thing. The 1986 trilogy was intended to prompt courts to take a long, hard look at cases prior to trial. Regardless of one's views of the trilogy, no one can dispute that the judicial system is better served by a searching review of summary judgment motions rather than the twin extremes of perfunctory denial or fact-finding subterfuge directed toward a disliked case, claim, or counsel. If judges viewing weak cases appreciate that a perfunctory denial largely immunizes the non-movant and counsel from Rule 11 sanctions or fee shifting, the court will look longer and harder at the matter.

Similarly, the anti-sanctions presumption should drive defense lawyers either to refrain from dismissal motions or to pursue them with greater vigor and professionalism.¹²² For example, in the unreported case of *Elona v. Frederick*,¹²³ the defendant's initial summary judgment motion and the two following motions amounted to little more than an assertion that plaintiff's claim lacked merit. Only six weeks before trial did defendant finally present the court with a motion satisfying the concerns of Justice White's *Celotex* concurrence¹²⁴ and a reasonable lawyer's notion

118. See *New York Bar Report*, *supra* note 10.

119. See *id.* at 286. I am perhaps particularly fond of the Association's view because I was a member of the Federal Courts Committee that drafted the Comments.

120. *New York Bar Report*, *supra* note 10, at 286 n.38.

121. See Stempel, *supra* note 80, at 159-81.

122. Cf. *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986) ("it would be inequitable to permit a defendant to increase the amount of attorneys' fees recoverable as a sanction by unnecessarily defending against frivolous claims"), *cert. denied*, 480 U.S. 918 (1987).

123. See *Elona v. Frederick*, No. 90-4154 (11th Cir. 1991) (decision pending as of this writing). I assisted the Center for Constitutional Rights in submitting an amicus brief in support of the sanctioned lawyer in *Elona*.

124. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (White, J., concurring).

of well-done summary judgment papers. Further, in *Chemiakin v. Yefimov*,¹²⁵ defense counsel either failed to note the absence of subject matter jurisdiction apparent on the face of plaintiff's complaint or failed to advise the court of its lack of jurisdiction. Because Rule 11 applies to all papers filed with the court, not just complaints, defense counsel in these cases could be viewed as culpable, but only plaintiffs were sanctioned.

In any event, defendants have not been deterred from substandard lawyering to the extent that plaintiffs have been affected. The "refrain or do it right" incentive of this article's approach would begin to redress this imbalance but should not unduly restrict the ability of defense lawyers and judges to deter frivolous litigation. Even in cases where complete summary judgment is obviously inappropriate, Rule 11 permits the sanctioning of particular claims, statements, and arguments even though other aspects of the case as a whole have merit.¹²⁶

Although the anti-sanctions presumption may, ironically, lead to some increase in summary judgment, the summary judgments granted should be those in which most observers (and reviewing courts) see dismissal as apt. Even if the dismissal is controversial or erroneous, the issue in question is isolated for examination on appeal. Although the appellate burden on losing claimants should not be underestimated, this burden carries with it the benefits of earlier review. If the claim is considered sufficiently weak and subject to dismissal by the circuit court as well, plaintiff's resources are probably best invested in something other than the claim at issue. Where summary judgment is reversed, plaintiff not only gets virtual sanctions immunity but also the opportunity to try the case before a properly re-educated trial court.¹²⁷ To best realize the gains of the anti-sanctions presumption and to minimize the pro-defendant aspects of the 1986 trilogy, courts should liberally utilize Federal Rule 54(b), 28 U.S.C. § 1292(b), and the collateral order doctrine to accord earlier review of orders granting partial summary judgment.¹²⁸

125. 932 F.2d 124 (2d Cir. 1991).

126. See, e.g., *Burull v. First Nat'l Bank*, 831 F.2d 788, 789-90 (8th Cir. 1987), (groundless claim sanctioned), *cert. denied*, 485 U.S. 961 (1988); *Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff*, 638 F. Supp. 714, 726 (S.D.N.Y. 1986) (sanctioning groundless affirmative defenses and counterclaims); *accord ABA Standards*, *supra* note 19, at 119.

127. *Sorluccho v. New York City Police Dep't.*, 888 F.2d 4 (2d Cir. 1989) provides an illustration. Despite the trial judge's obvious hostility toward the claim and disbelief of the plaintiff reflected in his grant of summary judgment to defendants, plaintiff on remand presented the case to a jury before the same judge and obtained a verdict in excess of \$250,000.

128. Fed. R. Civ. P. 54(b) permits a court to enter separate final judgments to permit separate appeals prior to final disposition of the entire case; 28 U.S.C. § 1292(b) permits a trial court to certify for immediate appeal an otherwise interlocutory order that presents a controlling question of law whose earlier resolution will advance final disposition of the case. See *Herr*, *supra* note 28, § 25.9; *Wright & Miller*, *supra* note 6, §§ 3920-3921. The collateral order doctrine permits interlocutory review of an order that completely resolves a disputed issue separate from the merits of the litigation where appeal after final judg-

At a minimum, the denial of a dismissal motion should operate to limit any sanction of defense counsel fees or costs to those expenses actually incurred through the making of the first motion that could have terminated the case. Imposition of Rule 11 sanctions after trial holds perhaps even more chilling impact than hyper-aggressive, erroneous pretrial sanctions awards. Even the worst pretrial Rule 11 decisions have a more limited impact on the parties and counsel than do post-trial awards. When counsel fees are used as the yardstick for Rule 11 sanctions and the court grants a dismissal motion, large fee awards are unlikely to occur. However, where the court, with little or no warning, imposes Rule 11 sanctions at the end of the litigation under the theory that a plaintiff's claim was flawed at the inception, the potential sanction can become enormous, effectively converting federal courts from the traditional American Rule to the English Rule regarding counsel fees.

The judiciary usually refrains from adopting broad or absolute rules and this is generally a good tendency. However, judicial reluctance to limit Rule 11 seems occasionally to stem both from judicial overestimation of the bad effects produced by rules restricting sanctions discretion and from lawyers arguing for protections that are too broad. For example, in *Townsend v. Holman Consulting Corp.*,¹²⁹ the court sensibly adopted the majority rule noted above: particular statements are sanctionable even if the paper as a whole possesses merit. In doing so, however, the Ninth Circuit seemed unduly cynical about the legal profession, stating:

It would ill serve the purpose of deterrence to allow, as does *Murphy*, a "safe harbor" for improper or unwarranted allegations. Under *Murphy*, a party that has one non-frivolous claim may pile on frivolous allegations without a significant fear of sanctions. . . . a party with one non-frivolous claim frivolously could add defendants without a significant fear of sanctions.¹³⁰

Townsend speaks as if lawyers are inexorably driven to make hokey claims and arguments despite the prevailing conventional wisdom that lawyers only hurt strong arguments by diluting them with weak arguments.¹³¹ In addition, the court envisions, presumably because counsel sought it, an excessively safe harbor. Any protective rule can become an

ment effectively denies a litigant meaningful review. Because of the "separate" requirement of the doctrine, it will have impact in only a few of the summary judgment cases addressed in this article but will have importance with certain relatively pure issues of law such as qualified immunity of government officials.

129. 929 F.2d 1358 (9th Cir. 1991) (en banc).

130. *Townsend*, 929 F.2d at 1363; see also 929 F.2d at 1367-68 (Canby and Pregerson, JJ., concurring) (contending that majority unnecessarily overruled *Murphy* and that instant case was apt for sanctions because all claims against particular party were frivolous).

131. See, e.g., Herr, *supra* note 28, §§ 3.1-6.11 (weak motions and arguments are strategically unwise as well as potentially unethical); T. Mauet, *Fundamentals Of Trial Techniques* (2d ed. 1988) (at trial, litigator should focus on strongest arguments to exclusion of weak arguments; favoring fewer rather than more arguments and theories of case).

invitation to abuse if it is overly protective or devoid of reasonable exceptions. For example, the argument rejected in *Townsend*—an absolute safe harbor so long as there exists one nonfrivolous claim against one defendant in a multiclaime, multidefendant case—proves too much. However, courts have, in determining the apt sanction, applied a general “standard” (as opposed to a rule) of assessing frivolous aspects of a case in the context of the merit of the litigation as a whole and the context of the dispute as a whole.¹³² For reasons discussed earlier, this article advocates an anti-sanctions presumption that functions more as a rule, but a flexible rule subject to narrowly confined but important exceptions. Consequently, this rule provides a safe harbor but not an impregnable fortress.

Although a large number of Rule 11 or other sanctions are imposed due to claims or assertions that are eliminated well before trial,¹³³ adoption of the presumptive safe harbor would provide valuable protection to litigants in close cases or where litigation becomes protracted. It would also tend to promote economy of legal resources by establishing some fairly clear limitations upon the potential for Rule 11 “satellite litigation.”

For example, in *Uselman v. Uselman*,¹³⁴ the anti-sanctions presumption would have been triggered by the repeated (five times) denial of summary judgment on the merits.¹³⁵ Consequently, the trial court would have been permitted to sanction counsel only if her misconduct had

132. See *ABA Standards*, *supra* note 19, at 125-26.

133. See, e.g., *Fox v. Acadia State Bank*, 937 F.2d 1566, 1570-71 (11th Cir. 1991) (sanctions imposed for securities law claims dismissed prior to settlement of remainder of case); *Val-Land Farms v. Third Nat'l Bank*, 937 F.2d 1110, 1111, 1117-18 (6th Cir. 1991) (sanctions imposed for statutory claim dismissed upon Rule 12(b)(6) motion); *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 499, 505 (3d Cir. 1991) (sanctions imposed after grant of summary judgment against employee's claim of contractual employment).

Of course, even where a claim is eliminated by Rule 12 or summary judgment, the sanctioned party may have something well worth arguing over. For example, plaintiff Quiroga asserted that he was covered by the Hasbro employees' manual and that statements in the manual created contract rights. Defendant Hasbro averred by affidavit that the manual did not apply to managerial employees. Quiroga responded that he was never told of this. The district and circuit courts found Quiroga to have thus presented “no evidence” in opposition to the summary judgment motion, entered partial summary judgment, and also concluded that Quiroga's employment contract claim was not well grounded in fact and thus was subject to Rule 11 sanctions. The *Quiroga* result seems unduly severe: Quiroga was an employee; his assertion of rights stemming from an employment manual would thus not seem frivolous absent a written disclaimer on the manual or conclusive proof that he was told of the managerial exception; Hasbro had neither. See also *Thompson v. Duke*, 940 F.2d 192, 197-98 (7th Cir. 1991) (upholding trial court grant of summary judgment in civil rights claims but reversing Rule 11 sanctions because adverse controlling precedent was sufficiently distinguishable to make case non-frivolous); *Bryant v. Brooklyn Barbecue Corp.*, 932 F.2d 697, 699-700 (8th Cir. 1991) (Rule 11 sanctions imposed after dismissal of complaint for failure to serve within 120-day limit on theory that unserved complaint did unfair damage to defendant's reputation).

134. 464 N.W.2d 130 (Minn. 1990); see also *supra* notes 94-95, 116 and accompanying text (discussing *Uselman*).

135. See *id.* at 136.

aided the case's survival. The facts of the case as reported could not support such a finding and the sanctions matter would have ended. Instead, the trial court plunged into the more difficult question of whether the plaintiff's claims were not only unsuccessful but so bad as to be frivolous, an inquiry in which the trial court erred, wasting its own time and the time of the unanimous state supreme court that reversed the sanctions order, as well as placing a metaphorical \$190,000 Sword of Damocles above the plaintiff's counsel.¹³⁶

Although *Greenberg v. Hilton International Co.*¹³⁷ correctly decided that pursuit of Title VII and Equal Pay Act claims did not warrant sanctions, this result would have been obtained more easily through application of the presumptive safe harbor. In *Greenberg*, the court denied defendant Hilton's summary judgment motion on the claims.¹³⁸ Thereafter, plaintiff and her counsel pursued extensive discovery attempting to establish a pattern of disparate treatment based on gender.¹³⁹ The discovery proceedings ultimately resulted in plaintiff's counsel being sanctioned, essentially for having misrepresented her intentions regarding the information sought.¹⁴⁰ As to the soundness of the claims themselves, however, the district court and the Second Circuit both found that the litigation was not frivolous in view of the information available to plaintiff and counsel at the time of filing. Invoking the presumptive safe harbor, the appellate court could have streamlined its affirmance on this point considerably yet retained its authority to impose sanctions for the papers filed in connection with the discovery battle due to the misconduct of plaintiff's counsel.

In *Chapman & Cole v. Itel Container International B.V.*,¹⁴¹ the court imposed sanctions after a seven-day bench trial. Prior to trial, plaintiff had sought dismissal and summary judgment, which the court denied.¹⁴² After trial, the court apparently determined that defendants had unfairly kept the case alive, primarily with assertions made at two pretrial conferences.¹⁴³ The opinion is unclear as to whether defendants made untrue or unfounded assertions in affidavits or other summary judgment papers. If the *Itel* trial court had been operating under this article's proposed regime, it would have been required to give the pretrial dismissal motions more scrutiny than it apparently gave, but would, absent proof of misconduct, been forced to forgo Rule 11 sanctions if the matter went to trial.

136. See *id.* at 140.

137. 870 F.2d 926 (2d Cir. 1989).

138. See *id.* at 930.

139. See *id.* at 930-32.

140. Plaintiff's counsel had asserted that she would retain expert witnesses for sophisticated statistical analysis of the data but later was discovered to have made no such arrangements. See *id.* at 938-39.

141. 116 F.R.D. 550 (S. D. Tex. 1987).

142. See *id.* at 552-53.

143. See *id.* at 553.

Either way, the system would have benefitted through avoidance of the seven-day bench trial or through avoidance of the extensive post-trial sanctions proceedings, which included the court's "show cause" hearing on sanctions and written opinion. For example, the court made a post-trial inquiry into the offending attorney's investigation of the claim, including *in camera* review of a tape of a telephone conversation between client and counsel and concluded that counsel should have realized that her client's statements were "based on nothing more than sheer speculation" and "had little, if any substantive value."¹⁴⁴ Putting aside the court's seeming internal contradiction (presumably, "sheer speculation" has no substantive value), the fact remains that the court could have brought such issues into sharp relief through a well-administered summary judgment hearing and decision. The court failed in this task. Whether, under these circumstances, counsel's continued forging ahead was frivolous conduct or zealous representation becomes a perhaps uncomfortably close question. These sorts of difficult questions are better decided on the merits through Rule 56 scrutiny. When the case survives summary judgment, post hoc Rule 11 inquiry most often only squanders time, nerves, judicial resources, and the funds, reputations, and client relations of counsel.

B. *Exceptions to the Presumption*

Notwithstanding the compelling logical linkage between Rule 11, Rule 12(b)(6), Rule 50(a), and Rule 56, I do not advocate a presumption against sanctions that is absolute or irrebuttable. Making this article's proposed "safe harbor" impregnable poses too much potential for encouraging litigants to stretch the facts unreasonably, to fabricate facts, or to engage in other serious misconduct (for example, discovery abuse such as stonewalling or seeking excessive discovery to postpone or defeat dismissal, urging witnesses to be unavailable or to give ambiguous or contradictory testimony).¹⁴⁵ Litigants and lawyers must be subject to sanctions where sufficiently improper conduct occurs. The suggested approach takes this policy goal into account. Although courts seldom give the matter extended discussion, case law suggests that many courts have implicitly applied the exception and grasped its rationale in cases where sanctions have been levied despite a claimant's having survived a dismissal motion.

For example, in *Pavelic & LeFlore v. Marvel Entertainment Group*,¹⁴⁶

144. *Id.* at 555.

145. See *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir. 1991). The *Townsend* court criticized Rule 11 safe harbors as compromising too greatly the deterrent purpose of the rule and leading to strategically abusive conduct. In my view the *Townsend* concern is overdone, at least rhetorically. See *supra* notes 129-32 and accompanying text. But in any event, I do not regard the *Townsend* criticism as debilitating to my proposed safe harbor, which becomes unsafe if the Rule 11 target has engaged in fraud or other egregious misconduct.

146. 493 U.S. 120 (1989).

plaintiff in the main action survived summary judgment by contending that its signature on a contract was forged or made without authorization by his attorney-in-fact. Ultimately, the district court, sustained by the Second Circuit, found the forgery claim to lack merit.¹⁴⁷ Although both the district and appellate courts stopped short of labeling plaintiff's affidavit, which alleged forgery, an outright fraud, the aroma of misrepresentation surrounded the decision to permit imposition of Rule 11 sanctions after trial of a claim that survived summary judgment. Implicitly, the lower courts took the view that this was not unjust since plaintiff's own affirmative but untrue representations resulted in the continuation of the litigation. The Supreme Court ultimately did not disturb that assessment, but limited the reach of the sanction by holding that Rule 11 did not impose vicarious liability on the law partner of the attorney who signed the offending pleading.¹⁴⁸

A more egregious situation produced post-trial Rule 11 sanctions in *Lockette v. American Broadcasting Co.*¹⁴⁹ Title VII plaintiff Lockette secretly tape recorded conversations with his co-workers. When defendant moved for summary judgment, Lockette submitted an affidavit asserting facts related to at least one of the taped conversations but did not disclose the existence of the tapes. When the tapes subsequently surfaced at trial, they clearly contradicted Lockette's affidavit. The court, in the midst of a bench trial, concluded that Lockette had misrepresented the now-undisputed content of the conversation and that this misrepresentation had resulted in the denial of the earlier summary judgment motion. Under these circumstances, the court found Rule 11 sanctions apt notwithstanding its earlier denial of summary judgment.¹⁵⁰

In *Avirgan v. Hull*,¹⁵¹ the now-famous lawsuit brought by the Christic Institute against a number of defendants alleged to have engaged in crim-

147. See *Calloway v. Marvel Entertainment Group*, 111 F.R.D. 637, 643-47 (S.D.N.Y. 1986), *aff'd*, 854 F.2d 1452 (2d Cir. 1988), *rev'd in part sub nom. Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). The district court found that "it appears that in their ambition to maintain this action, Calloway and his counsel allowed his inconclusive ability to recognize his signature to be translated into a conclusive denial of his signature." *Calloway*, 111 F.R.D. at 647.

148. See *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126-27 (1989). In *Healey v. Chelsea Resources, Ltd.*, 133 F.R.D. 449, 453 (S.D.N.Y. 1990), the court cited *Calloway* and *Pavelic* approvingly in implicitly endorsing this article's approach in imposing Rule 11 sanctions despite having previously denied summary judgment. See *supra* note 101 and accompanying text.

149. 118 F.R.D. 88 (N.D. Ill. 1987).

150. See *Lockette*, 118 F.R.D. at 91-92.

151. 705 F. Supp. 1544 (S.D. Fla. 1989), *aff'd*, 932 F.2d 1572 (1991). Because of the subject matter of the lawsuit (U.S. policy in Central America during the 1980s) and the large sanction (more than \$1 million) imposed upon a public interest organization, *Avirgan* has received extensive press coverage and legal commentary. See, e.g., Note, *A Prospective Cap on Rule 11 Sanctions*, 56 Brooklyn L. Rev. 1275, 1276 (1991) ("As a result of . . . *Avirgan v. Hull*, the position of those critical of Rule 11 has been strengthened"); *Defendants win Fees in Suit on Contra Aid*, N.Y. Times, Mar. 17, 1989, at B4, col. 3 (discussing possible chilling effect of *Avirgan*); Barringer, *The Law*, N.Y. Times, Feb. 6, 1989, at A11, col. 1 (reporting sanctions directed against plaintiffs).

inal conspiracy in aid of the Nicaraguan Contra rebels, the district court found that plaintiffs and counsel avoided summary judgment by using detailed affidavits alleging specific facts, but that plaintiffs failed to produce any of this testimony or any related evidence at trial. The district court, concluding that plaintiff's affidavits were designed to avoid summary judgment in the vain hope that favorable evidence would surface during the pendency of trial, awarded defendants Rule 11 sanctions exceeding \$1 million.¹⁵²

Dayan v. McDonald's, Corp.,¹⁵³ an Illinois case applying that state's version of 28 U.S.C. § 1927, the provision that authorizes sanctions against vexatious attorney conduct, also fits this pattern. The court in *Dayan* awarded more than \$1.8 million dollars in fees to defendant based on a finding that plaintiff, whose Parisian McDonald's franchises were revoked for breach of contract, kept the lawsuit alive (and even obtained a preliminary injunction) through fraudulent misrepresentations to the court. In other cases, the misconduct of a party sanctioned after trial has been less than fraudulent but still blameworthy in some aspect.¹⁵⁴

Cases like *Pavelic & LeFlore*, *Lockette*, *Avirgan*, and *Dayan* are quite distinct from cases in which a claimant loses because the fact finder elects to credit one side's testimony in the face of opposing testimony that can not objectively be deemed so weak as to merit pretrial dismissal. Similarly, cases of the *Pavelic/Lockette* genre are very different from cases based on circumstantial evidence where the factfinder is unwilling to draw the inference requested by the claimant. In cases where a claimant goes to trial and has claims rejected by the factfinder based on assessments of credibility (for example, what was really said at the contract negotiation) or on inferences drawn from circumstantial evidence (for example, whether the sales managers of the three local widget makers met to discuss price-fixing or a golf outing), a claimant's loss is only that—a litigation disappointment. Even if the jury deliberates for only three minutes before rendering a defense verdict, the claim does not thereby become frivolous.

Of course, where dismissal was avoided by wrongdoing, post-trial sanctions are in order and the presumption against sanctions has been rebutted. Defining wrongdoing requires care but should not unduly increase the judicial burden. Fraud or misconduct of the sort that has traditionally satisfied Federal Rule of Civil Procedure 60(b)(3) (permitting

152. See *Avirgan*, 705 F. Supp. at 1545-51.

153. 126 Ill. App. 3d 11, 466 N.E.2d 945 (1984).

154. See, e.g., *Barrios v. Pelham Marine, Inc.*, 796 F.2d 128, 130-33 (5th Cir. 1986) (summary judgment motion made at the threshold of trial); *Chapman & Cole v. Itel Container Int'l, B.V.*, 116 F.R.D. 550, 552 (S.D. Tex. 1987) (last minute settlement to avoid sanctions; court also implies misconduct and bad faith by sanctioned party, a defendant); *Johnson v. New York City Transit Auth.*, 116 F.R.D. 394, 395-96 (E.D.N.Y. 1986), *aff'd regarding sanctions but remanded for reconsideration of amount*, 823 F.2d 31 (2d Cir. 1987) (repeated efforts by discrimination plaintiff to relitigate unsuccessful claims in new forums).

relief from judgment procured by fraud) would support Rule 11 sanctions even where dismissal was denied so long as the court made specific findings supported by the record to conclude that the non-movant was guilty of such misconduct. In addition, a claimant-non-movant's recklessness in averring ability to produce evidence at trial would also support a shifting of the presumption and an imposition of Rule 11 sanctions in the appropriate case.¹⁵⁵ Where, however, a claimant represents ability to present evidence and is not at fault for inability to produce the promised evidence, Rule 11 sanctions should not be available even though the matter appears in retrospect to have been apt for pretrial dismissal. For example, where a witness not subject to subpoena power declines at the last minute to voluntarily testify, sanctions would be inappropriate.

C. *Allocating Error Costs*

A more difficult question arises where a trial court's denial of a dismissal motion appears in error. Where a trial court refuses to dismiss a claim pursuant to Rule 12(b)(6) or Rule 56 summary judgment because it has miscalculated the potential probative value of the non-movant's evidence or legal argument, or because the court failed to insist on the rigorous analysis of the claimant's burden and proofs imposed in the Supreme Court's 1986 trilogy, one can argue that a claim potentially violative of Rule 11 (or groundless within the meaning of Title VII and 42 U.S.C. § 1988) has "slipped through the cracks" of the federal judicial system.¹⁵⁶ In my view, there are comparatively few cases where claims and arguments bordering on the frivolous are not intercepted by pretrial motion. Where this occurs, however, it constitutes an error cost that must be internalized by the judicial system and defendants rather than by claimants.

Just as dismissal does not indicate frivolousness, reversal of a refusal to dismiss does not, standing alone, indicate that the earlier denial was sufficiently erroneous to make the ultimately defeated claim sanctionable. Motions pursuant to Rules 12(b)(6), 56, and 50(a) often present close issues dividing bench, bar, and the academy.¹⁵⁷ For example, in each of the 1986 trilogy cases,¹⁵⁸ the Supreme Court reversed respected circuit

155. See *New York Bar Report*, *supra* note 10, at 286.

156. Of course, the mere dismissal of a claim by pretrial motion does not indicate that the claim violated Rule 11 or Section 1988. See *Hughes v. Rowe*, 449 U.S. 5, 15 (1980); *O'Neal v. DeKalb County, Georgia*, 850 F.2d 653, 658 (11th Cir. 1988).

157. The current furor over Rule 11 provides an example of considerable dispute within the profession, which according to the comments received by the Advisory Committee in response to its Call for Comments divides quite sharply into Rule 11 supporters, moderate critics of the current rule, and critics favoring a return to the pre-1983 Rule 11. According to the comments and a survey conducted by the Federal Judicial Center, judges are most supportive of the current Rule 11, see T. Willging & E. Wiggins, *supra* note 7, at Pt. 1A, at 1, while practitioners are most hostile with most academics displaying strong criticism and proposing substantial amendment.

158. See *supra* notes 73-89 and accompanying text.

court opinions denying summary judgment.¹⁵⁹ If anything, an appellate court reversal of the denial of a dismissal motion or the district judge's change of heart on the issue usually suggests that the issue was close. If, however, the denial of summary judgment was in fact clear error resulting from misjudgment or insufficient scrutiny by the district court, the hard question facing this article's approach devolves to who should pay the costs of error.

The presumptive bar to sanctions, although imperfect, best serves the long-term interests of all litigants and the judicial system. Although defendants in specific cases may claim that judicial error required them to expend funds in needless defense, such defendants can articulate no persuasive reason why plaintiffs, particularly plaintiffs of modest means who function virtually as congressionally deputized private attorneys general under the Title VII and Section 1988 fee-shifting provisions, should underwrite errors of a trial court.

*Jennings v. Joshua Independent School District*¹⁶⁰ provides a good example of the problem. In *Jennings*, plaintiffs (a high school student and her father as next friend) alleged that a high school's "dog sniffing" program aimed at drug contraband constituted an unconstitutional search. Plaintiffs sued the school district, the superintendent, the vice principal, a police officer, the city, and the dog handlers. The handlers and the school district moved for summary judgment, which the trial court denied "because no evidence had been submitted relating to the dog's reliability."¹⁶¹ A five-day trial resulted, with the court directing a verdict at the close of plaintiffs' case for all defendants except the police officer, for whom the jury returned a verdict. The district court then imposed Rule 11 sanctions against plaintiff.

Although the trial judge apparently reasoned (at least prior to trial) that a reliable dog is a constitutional dog, the Fifth Circuit saw it differently. Citing a seven-year-old precedent, it declared that "use of trained dogs to sniff automobiles parked on public parking lots does not constitute a search within the meaning of the fourth amendment."¹⁶² The appellate court also concluded that the police officer was entitled to objective qualified immunity and that the trial regarding his subjective good faith belief in the sniffer dog's accuracy and legality of the operation

159. On remand in *Celotex*, defendant's summary judgment motion was again denied in an opinion by a divided panel. See *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37-40 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). Tallying the views of judges and justices favoring and opposing summary judgment in *Celotex*, *Matsushita*, and *Liberty Lobby* reveals 20 jurists favoring summary judgment in these three cases with 18 jurists opposed. Although one might technically label refusals to grant summary judgment "error" in light of the Court's ultimate criteria, it would be ludicrous to suggest that a district judge denying summary judgment in any of the trilogy cases would have erroneously insulated the non-movant from Rule 11 sanctions if operating under this article's proposed approach.

160. 877 F.2d 313 (5th Cir. 1989).

161. *Id.* at 315.

162. *Id.* at 316.

had been superfluous.¹⁶³ Thus, acting well after the fact, the court found plaintiffs' claims to be frivolous and sanctionable to the tune of \$84,000, a figure that the Fifth Circuit found to require remand in light of intervening case law adopting the "least severe sanction" approach.¹⁶⁴

The *Jennings* result is particularly pernicious in that it imposes potentially devastating sanctions against a civil rights plaintiff because a reviewing court ultimately decided that plaintiffs' claims were barred *as a matter of law*¹⁶⁵ even though the trial court permitted the case to extend from pleading stage through discovery through trial to verdict and applied incorrect legal criteria for deciding defendants' dismissal motions. Despite these judicial errors, the trial court later found the law so crystal clear that it determined, again as an objective matter of law, that plaintiffs must have brought the suit for the improper purpose of harassment (since plaintiffs presumably would know the law even if the district court did not). One need not condone plaintiffs' handling of the case nor disagree with the Fifth Circuit's substantive legal viewpoints to appreciate the trap cases like *Jennings* pose for plaintiffs. In a variant of the old, bad joke ("first prize is a week in Philadelphia; second prize is two weeks in Philadelphia"), plaintiff is permitted to go to trial, which serves only to increase the amount of a post hoc sanction.

The need to avoid making plaintiffs insurers of pretrial dismissal decisions is even more compelling where the defendants are government entities or well-heeled commercial defendants¹⁶⁶ who can not only better bear the risk of judicial error but who also are often the very entities against which the judiciary should not wish to discourage civil rights litigation.¹⁶⁷ The logic of the rules and statutes involved and the imperative of judicial restraint in applying sanctions and fee-shifting statutes counsels strongly against any drift toward making sanctions doctrine a fee-shifting mechanism for civil rights defendants.¹⁶⁸ To prevent the anti-sanctions presumption from encouraging defendants to forgo meritorious summary judgment motions, the presumption should not only attach where summary judgment is denied but should ordinarily be established where the case proceeds to trial without a defendant seeking pre-verdict termination.

163. *See id.* at 317.

164. *Id.* at 322.

165. *See id.* at 320. "Discovery brought forth no new evidence nor was there any basis for expecting it to do so. Because the facts were known and virtually uncontested, the question here for Rule 11 purposes must be whether Jennings' legal theories . . . could fairly be said to have been unreasonable from the point of view both of existing law and its possible extension, modification or reversal." *Id.* at 320.

166. Private defendants will almost always have commercial general liability insurance that provides a defense to liability claims. In relatively constrained litigation, insurers will bear the great bulk of defense costs.

167. This is particularly the case regarding Section 1988, which accompanies 42 U.S.C. § 1983, which was designed by Congress to provide private citizens with legal recourse in federal court against local governments that violate civil rights.

168. *See Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987).

D. *The Special Circumstances of Civil Rights Claims*

The value of the presumptive bar to sanctions outweighs its costs in all suits but especially in civil rights actions. The overall tone of the Federal Civil Rules for more than 50 years has been one encouraging access to the federal courts. In passing the civil rights acts, the Congress of a century ago sought to empower litigants to take claims of civil rights violations to federal court without cowering in fear. The 1976 Congress added strength to these laws when it enacted Section 1988.¹⁶⁹ Title VII of the Civil Rights Act of 1964 both established the right to a remedy for discrimination and provided incentive to plaintiffs through the pro-plaintiff fee-shifting provision upon which Section 1988 was modeled.

Although the drafters of the 1983 amendment to Rule 11 certainly intended to provide additional deterrence of frivolous litigation, they did not intend that civil rights litigants be discouraged from vindicating the substantive rights granted by Congress. Where a civil rights litigant survives dismissal motions but is ordered to reimburse defendants for even a portion of the defendant's counsel fees, word travels fast among the relatively small plaintiff's civil rights bar. Subsequent civil rights plaintiffs and counsel, especially those in the same locale, will hesitate to pursue even meritorious and compelling claims where victory cannot be guaranteed.

Absent this article's suggested safe harbor, the potential exists for what began as a congressionally created one-sided English Rule for civil rights plaintiffs to evolve (perhaps "regress" is a more apt term) into a judicially created one-sided English Rule for defendants. Despite the care most courts now seem to give Rule 11 matters in civil rights cases,¹⁷⁰ a relatively small number of poorly decided cases can have the substantial chilling effect feared by civil rights activists and Rule 11 opponents. Although the "abuse of discretion" standard of review endorsed by the Supreme Court¹⁷¹ has sufficient flexibility to provide a wealth of differing levels of scrutiny,¹⁷² it is generally regarded as a deferential standard of appellate review.¹⁷³ The presumptive bar to sanctions helps provide the necessary rigor to Rule 11 review by further defining the abuse of discretion standard, reducing the likelihood of extreme error, and limiting the risk of extremely high fee-shifting sanctions and the most chilling sorts of Rule 11 outcome. The presumptive sanctions bar approach also minimizes the need for the greater expenditure of judicial resources required by highly case-specific adjudication by providing a ready yardstick that both directs and simplifies the reviewing court's analysis.

Congress enacted the Attorney's Fees Civil Rights Act of 1976, now

169. See *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 939 (2d Cir. 1989), *remanded and vacated on other grounds*, 875 F.2d 39 (2d Cir. 1989).

170. See Tobias, *Rule 11 Recalibrated*, *supra* note 50, at 110-16.

171. See *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2460-61 (1990).

172. See 1 S. Childress & M. Davis, *Standards of Review* § 4.21 (1986).

173. See *id.*

codified at 42 U.S.C. § 1988, to reduce perceived barriers to the prosecution of civil rights and citizen action suits. The 1976 Act was a legislative overruling of the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,¹⁷⁴ which had held that prevailing environmental protection plaintiffs were not entitled to fees from defendants under the developing common law "private attorney general" exception to the American Rule. The American Rule requires each litigant to bear its own counsel fees but not ordinarily those of the opposing party. Congress correctly concluded that too many civil rights and public interest litigants would be deterred from bringing even the most meritorious claims because of their limited resources and because any damage award resulting from successful litigation would be small in relation to the cost of prosecuting the litigation. Section 1988 is patterned after Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). The Supreme Court has interpreted these counsel fees recovery provisions congruently.¹⁷⁵

Section 1988 provides that in any action commenced under 42 U.S.C. §§ 1981, 1982, 1983, 1985, or 1986, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee. Courts interpreting Section 1988 have noted that it is designed primarily for the benefit of plaintiffs—who will ordinarily be awarded fees unless special circumstances make a fee award unjust—but that prevailing defendants may obtain a fee award. However, because of the congressional intent underlying Section 1988 and its clear policy to encourage rather than discourage civil rights claims, Section 1988 has not been interpreted as an English Rule for defendants. Rather, defendants may obtain Section 1988 fees only where a claim is "meritless in the sense that it is groundless or without foundation."¹⁷⁶ Prevailing defendants may not obtain a fee award as a matter of course but can receive counsel fees only "upon a finding that the plaintiff's action was frivolous, . . . even though not brought in subjective bad faith."¹⁷⁷

The leading Supreme Court decision regarding civil rights fee shifting discussed the standard for defense counsel fees recovery in language that buttresses arguments for this article's proposed presumptive bar to sanctions:

In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of

174. 421 U.S. 240 (1975).

175. See *Hughes v. Rowe*, 449 U.S. 5, 14 (1980); *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 420-22 (1978). *Christiansburg Garment*, the earlier and more expansive case involving Title VII, continues to be the leading case interpreting both provisions. See *Hughes*, 449 U.S. at 14-16.

176. *Hughes*, 449 U.S. at 14.

177. *Christiansburg Garment*, 434 U.S. at 421.

hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.¹⁷⁸

Claims dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) are not automatically candidates for sanction because "[a]llegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation' " for purposes of Section 1988.¹⁷⁹

Lower courts interpreting Section 1988 in the light of Supreme Court precedent have largely hewed to this line, making defense fee awards a rarity.¹⁸⁰ However, there are some divergent views on this point. For example, the court in *Greenberg v. Hilton International Co.*¹⁸¹ seemed untroubled, at least in the abstract, by post-trial Section 1988 fee awards for defendants, stating:

At the [trial] disposition stage, the strength or weakness of a case may be viewed as a whole. That is not true when only a motion is before the court. Cases that are ultimately viewed as frivolous may well survive motions to dismiss under a system of notice pleading that does not require factual detail and even motions for summary judgment in which the evidence may be presented in sketchy fashion and credibility may not be taken into account.¹⁸²

Greenberg presents both the Rule 12(b)(6) and summary judgment motions as excessively anemic. As a critic of the 1986 trilogy,¹⁸³ I am

178. *Id.* at 421-22. The Court added that fees may be assessed against a plaintiff who continues to litigate after a claim clearly became groundless. *See id.* at 422.

179. *Hughes*, 449 U.S. at 15-16.

180. *See, e.g.,* *Nationalist Movement v. City of Cumming*, 913 F.2d 885, 895 (11th Cir. 1990) (prevailing § 1983 defendant not entitled to counsel fees), *cert. denied*, 111 S. Ct. 767 (1991); *Donaldson v. Clark*, 819 F.2d 1551, 1561-62 (11th Cir. 1987) (Hill, J., concurring) (concluding that prevailing Eleventh Circuit precedent forbids summary judgment in civil rights claims where circumstantial evidence supports conflicting inferences, even where claimant's proof is seen as weak by the court); *Unity Ventures v. County of Lake*, 894 F.2d 250, 254-55 (7th Cir. 1990) (losing § 1983 plaintiff cannot be held subject to fees on the basis of adverse case law subsequent to its complaint); *Sullivan v. School Bd.*, 773 F.2d 1182, 1188-90 (11th Cir. 1985) (that discrimination claim required trial weighs against award of fees to prevailing defendant); *Summer v. Fuller*, 718 F. Supp. 1523, 1525 (N.D. Ga. 1989) (plaintiff's claim must be patently frivolous to justify Section 1988 fees for defendant); *Clay v. Harris*, 583 F. Supp. 1314, 1317 (N.D. Ind. 1984) (section 1988 applicable to losing plaintiff only in unusual case).

181. 870 F.2d 926 (2d Cir.), *remanded and vacated on other grounds*, 875 F.2d 39 (2d Cir. 1989).

182. *Greenberg*, 870 F.2d at 940.

183. *See* Stempel, *supra* note 80, at 159-81.

heartened by the *Greenberg* court's professed lackadaisical unwillingness to grant summary judgment. It is not, however, an accurate appraisal of the manner in which federal courts do their work: "sketchy" submissions in opposition to summary judgment are little protection to claimants. Where credibility contests drive the denial of pre-verdict dismissal efforts, courts are generally wise to view different versions of reality as resulting from honest disagreement rather than from factual frivolity or misconduct. A jury's verdict or a judge's findings may be final, but, to paraphrase Justice Jackson's quip about the Supreme Court, finality does not equal infallibility.

As discussed above,¹⁸⁴ both Rule 12(b)(6) and Rule 56 motions can be extremely effective for providing a comprehensive overview of the respective legal and factual merits of a challenged claim, so long as counsel and the parties play by the rules. Consequently, denial of a pre-verdict disposition and trial of civil rights claims should trigger the presumption against sanctions, but the presumption can be overcome where claimants and counsel have not played by the rules.

The arguments for the presumptive bar to Section 1988 and for Title VII fee shifting where pretrial dismissal is denied parallel those of the Rule 11 context but are stronger because of the civil rights claims being made. These laws clearly reflect both enduring legislative sentiment¹⁸⁵ and a higher order of law than that of the civil rules. The Rules Enabling Act states that the civil rules "shall not abridge, enlarge or modify any substantive right."¹⁸⁶ As one professional group noted, "[o]ne can persuasively argue that a procedural rule, which under the Rules Enabling Act becomes law through the inaction of Congress, should not so substantially change practice in an area of litigation (civil rights and discrimination cases) where Congress has affirmatively enacted a framework favorable to these claims and the plaintiffs that bring them."¹⁸⁷ However, this bar association, like the courts to date, declined to interpret Section 1988/Title VII fee shifting as requiring claimant conduct worse than that justifying Rule 11 sanctions.¹⁸⁸ Despite the tentative consensus

184. See *supra* notes 63-89 and accompanying text.

185. In both 1990 and 1991, Congress passed strong civil rights legislation in the tradition of Section 1988 and Title VII. President Bush, however, vetoed the 1990 legislation and the attempt to override the veto fell two votes short in the U.S. Senate. See Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. Tol. L. Rev. 583, 585 (1991).

186. 28 U.S.C. § 2072 (1988).

187. *New York Bar Report*, *supra* note 10, at 281.

188. See *Matthews v. Freedman*, 882 F.2d 83, 86 (3d Cir. 1989). However, the Advisory Committee, in its draft Committee Note to proposed amended Rule 11, states that "In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees." Committee on Rules of Practice and Procedure of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence 6 (August 1991) (copies on file with author). Presumably, this means that Rule 11 sanctions should not be awarded in a Title VII or civil rights case

that Rule 11 frivolousness should either be equated with Section 1988/ Title VII frivolousness or that Rule 11 constitutes an independent obligation of counsel beyond that of the civil rights fee-shifting statute, the policy arguments supporting the presumptive bar to sanctions are stronger in civil rights cases because of the broader purpose of those laws and because these laws originated from "hands-on" congressional legislation rather than from congressional acquiescence to judicial rulemaking.

CONCLUSION

Rule 11 and its jurisprudence have proven problematic. Even proponents of the rule such as the Advisory Committee have acknowledged this through the Call for Comments and through proposed amendment of Rule 11.¹⁸⁹ I have not attempted to offer a comprehensive blueprint for amending Rule 11¹⁹⁰ but have instead suggested one discrete but valuable fine-tuning of sanctions practice under Rule 11 and fee-shifting pursuant to Title VII and Section 1988.

Nonetheless, the presumptive protection suggested here can be impor-

where the court could not also award defense fees. Strict adoption of this view, which has not been thoroughly thought through by either the bench or this author, could result in situations in which a court refuses Rule 11 sanctions because a claim, although insufficiently grounded in fact, was not frivolous within the meaning of *Christiansburg Garment*. In addition, *Christiansburg Garment* and its progeny may require that courts view civil rights cases as a whole for purposes of Rule 11 and preclude Rule 11 sanctioning of a single defective claim in an otherwise nonfrivolous civil rights action.

189. See Proposed Amendments to the Federal Rules of Civil Procedure, Proposed Fed. R. Civ. P. 11 (Aug. 1991 draft).

As of this writing, the Advisory Committee on the Federal Civil Procedure Rules and the Standing Committee on Federal Practice and Procedure of the United States Judicial Conference have issued a draft for new Rule 11 for formal public comment (previous working drafts of the Advisory Committee have been widely circulated for informal comment). The comment period ends on February 1, 1992. A testimonial hearing is scheduled for November 21, 1991. After the public comment period, proposed amendments may be reconsidered, revised, or dropped prior to submission to the Supreme Court for transmittal to Congress, which then has 180 days to act before the proposed rules take effect automatically. To quote the Beatles, rulemaking is a "long and winding road," although the profession differs on whether this is a good or bad trait. Compare Stempel, *supra* note 80, at 181-92 (favoring various hurdles established by different levels of review and broad interest group input) with Mullenix, *supra* note 36, at 797-805 (criticizing increasing politicization of rulemaking process, implying that the process's openness as well as its checks and balances contribute to the problem).

190. Rule 11 scholarship abounds with more comprehensive proposals, including the *New York Bar Report*, *supra* note 10, at 299-302, which proposes general omnibus sanctions rule directed toward abusive conduct and repeal of Rule 11 and other specific sanctions rules. In addition, the report favors that Rule 11, if retained, be amended to make sanctions discretionary, to de-emphasize fee-shifting as a sanction, to de-emphasize focus on the complaint, to focus on lawyer conduct rather than resulting product, to require a hearing and specific fact-finding as prerequisite to sanction, to add vicarious liability for law firms, and to specify that improper purpose alone justifies sanctions for filing even legally meritorious paper. Other comprehensive proposals include: Cochran, *Rule 11: The Road to Amendment*, 8 Fifth Cir. Rptr. 559, 573-75 (1991); Nelken, *Chancellor*, *supra* note 15, at 385-90; G. Joseph, *supra* note 108, at 303-10; Burbank, *supra* note 15, at 1932-34, 1941-43, 1955-62; G. Vairo, *supra* note 1, at 19-23.

tant. As one commentator noted, "equal justice will be possible under Rule 11 only when federal judges subordinate their own normative preferences to the stated normative preferences of the Rule and of the rulemakers."¹⁹¹ The constraints of the suggested approach would enhance neutrality in Rule 11 practice and militate against normative second-guessing.

Perhaps a further advantage of my proposal is that it does not require amendment of the Civil Rules to take effect. Rather, it is required by a proper reading of the Civil Rules.

191. See Burbank, *supra* note 15, at 1932-33.